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Issue date: 05Aug2002

CASE NO.: 2002 AIR 10

In the Matter of

SHERRY J. PARSHLEY
Complainant

v.

AMERICA WEST AIRLINES
Respondent

APPEARANCES:

Ms. Elizabeth A. Faulkner, Attorney
For the Complainant

Ms. Barbara A. Bailey, Attorney
For the Respondent

BEFORE:

Richard T. Stansell-Gamm
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER -
DISMISSAL OF COMPLAINT**

This case arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, 49 U.S.C. § 42121, (“AIR 21” or “Act”), as implemented by 29 C.F.R. Part 1979 (2002).¹ This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration (“FAA”) or any other provision of Federal law relating to air carrier safety.

PROCEDURAL BACKGROUND

¹29 C.F.R. Part 1979, Vol 67 Fed. Reg. 15454, Interim Final Rule, effective April 1, 2002.

On July 31, 2001, Ms. Sherry Parshley filed a complaint with the Secretary, U.S. Department of Labor (“DOL”), alleging that America West Airlines (“America West”) had terminated her employment as a financial manager on May 2, 2001 because she had informed her supervisor in March 2001 of potential inventory control and inspection issues and her intention to obtain additional documentation and take the issue to the Director of Quality Assurance. On December 14, 2001, the Regional Administrator for the Occupational Safety and Health Administration (“OSHA”), DOL, who investigated Ms. Parshley’s complaint, notified the parties that he found no merit to the complaint. Specifically, although Ms. Parshley had engaged in a protected activity and established a *prima facie* case, the Regional Administrator determined that her termination was part of a legitimate reduction in work force and corporate reorganization. Documentation established that she had associational problems within the company, which America West took into consideration. On January 29, 2002, in response to the Regional Administrator’s notice that she received on January 2, 2002, Ms. Parshley objected to the stated findings and requested an administrative hearing.

Pursuant to a Notice of Hearing, dated February 4, 2002, I set a hearing date of February 26, 2002 for this case in Phoenix, Arizona (ALJ I).² Due to scheduling issues, I later continued the case until April 23, 2002 (ALJ II). Prior to the hearing, I denied a request for a protective order (ALJ III) and a Motion for Summary Decision (ALJ IV). On April 23, 2002, under the provisions of 49 U.S.C. §42121 (b) (2) (A), and 29 C.F.R. § 1979.107 (b), I conducted a hearing in Phoenix, Arizona with Ms. Parshley, Ms. Faulkner, and Ms. Bailey. A representative for DOL did not attend the proceeding.

Complainant’s Statement of the Case³

Ms. Parshley was a highly valued employee of America West, who had received several promotions and merit pay raises. Consistent with her habit of being outspoken concerning safety issues, Ms. Parshley reported to her supervisor, Mr. Harry, her concern about unsafe condition in the company’s warehouse due to irregularities in the receipt of aircraft part. She had recently learned nearly 800 aircraft replacement parts had been placed in the supply computer system and on the parts shelves without proper inspection. Further, some inventory parts did not have the requisite serviceable tags. She informed Mr. Harry of her intention to conduct a further investigation and to report the discrepancies to another America West manager if warranted. However, due to the subsequent heavy work load placed on her by Mr. Harry, Ms. Parshley was unable to complete her investigation.

Without warning on May 2, 2001, Ms. Parshley was fired during the company’s reduction

²The following notations appear in this decision to identify specific evidence: CX - Complainant exhibit; RX - Respondent exhibit; ALJ - Administrative Law Judge exhibit; and, TR - Transcript of hearing.

³TR, pages 13 to 18 and 142, and closing brief.

in force (“RIF”) and told that her position had been eliminated. However, eleven days later America West hired a person from outside the company to fill her position. America West indicates Ms. Parshley was selected for the reduction in force due to performance issue. Ms. Parshley believes that stated purposes is pretextual because she had no performance problems. According to her appraisals, America West considered Ms. Parshley a capable manager. She had not received any complaints, counselings, or corrective actions since joining America West. Although her supervisor, Mr. Harry, denies any retaliation was involved in his selection of Ms. Parshley for the RIF, his previous denial of any conversation concerning parts, coupled with the inconsistency between his formal “meets expectations” appraisal of her performance just a month earlier and the discharge action, calls into question the probative value of his testimony.

As relief, Ms. Parshley seeks monetary damages reflecting lost wages in the approximate amount of \$100,000 plus litigation expenses.

Respondent’s Statement of the Case ⁴

For three reasons, Ms. Parshley is unable to meet her burden to prove she was fired in retaliation for making safety complaints. First, Ms. Parshley is one of 120 employees who were selected to be released during a company-wide reorganization. Although Ms. Parshley had good technical skills, her supervisor, Mr. Harry, had received numerous complaints from other managers who found her difficult. Mr. Harry had counseled Ms. Parshley about the relationship problems and mentioned it in her performance report. Second, by clear and convincing evidence, America West has established that Ms. Parshley was terminated as part of a legitimate restructuring of the company in April 2001. The purpose of the America West reorganization was to both reduce costs and increase productivity by separating weak performers. Mr. Harry selected Ms. Parshley for performance reasons specifically related to her relationship problems with other workers and directors. Mr. Harry’s boss concurred with her selection. Third, Ms. Parshley’s earlier complaints to Mr. Harry were not safety complaints and did not constitute protected activity. When she discussed the parts issue with Mr. Harry, she never mentioned a safety issue. Instead, she expressed an intention to conduct a computer inquiry.

Even if Ms. Parshley prevails on her AIR 21 complaint, she should not receive her requested damages due to her failure to make reasonable efforts to find employment. Possessing extensive education credentials and certification as a management accountant, Ms. Parshley only sent out 26 resume over the course of a year and obtained only three interviews related to finance.

America West asserts Ms. Parshley’s discrimination complaint should be dismissed and

⁴TR pages 20 to 26 and closing brief.

seeks attorney fees.⁵

ISSUES

1. Whether the Complainant, Ms. Sherry Parshley, engaged in a protected activity under AIR 21.
2. If the Complainant, Ms. Sherry Parshley, engaged in a protected activity as an employee of the Respondent, America West Airlines, whether the Respondent was aware of the protected activity and the protected activity contributed in part to the decision by the Respondent to terminate the employment of the Complainant.
3. If the Complainant, Ms. Sherry Parshley, establishes that her protected activity contributed in part to her termination, whether the Respondent, America West Airlines, has demonstrated by clear and convincing evidence that it would have terminated the Complainant, even in the absence of the protected activity.
4. If the Complainant, Ms. Sherry Parshley, fails to establish that her protected activity contributed in part to her termination, whether Ms. Parshley's discrimination complaint was frivolous or brought in bad faith.

SUMMARY OF DOCUMENTARY EVIDENCE AND TESTIMONY

My decision in this case is based on the sworn testimony presented at the hearing and following documents admitted into evidence: CX 1 to CX 24, CX 28 to CX 33, CX 37, CX 38, RX 1, RX 3 to RX 16, RX 19 to RX 58.⁶

Complainant's Case

⁵According to 49 U.S.C. § 42121(b)(3)(C) and 29 C.F.R. § 1979.109 (b), if upon the request of a respondent, an administrative law judge determines that a complaint was frivolous or brought in bad faith, the judge may award the respondent a reasonable attorney fee, not exceeding \$1,000.

⁶At the hearing, Ms. Faulkner withdrew CX 25, CX 26, CX 27, and CX 36. CX 34 and CX 35 did not exist. RX 2, RX 17 and RX 18 were offered but not admitted. Although Ms. Faulkner requested, and I granted, that the record remain open for receipt of Mr. Shannon Hyland's deposition, I was subsequently informed that the parties did not conduct that deposition.

Documentary Exhibits

CX 1 and CX 24 (also RX 13) - Ms. Parshley's performance appraisal, dated and signed by Mr. Harry and Ms. Parshley on March 15, 2001, contains an overall rating of "meets expectations." According to the appraisal form's preamble, this rating means Ms. Parshley meets, or exceeds, expectations and "contributes to the success of the Company" with only occasional supervision and follow-up.

The form also sets out five company imperatives that form the basis for a performance appraisal. In the first area of customer expectations, which requires the individual to identify and exceed the expectations of both external and internal customers, Mr. Harry first observed that Ms. Parshley had a broader range of responsibility than her peers in other financial groups. She worked hard to meet the "occasionally conflicting priorities" of her personnel. While division managers respected her knowledge and experience, she "sometimes" struggled with "her relationships with certain division managers."

In the imperatives of achieving lowest unit cost and building financial muscle, Ms. Parshley received praise. Mr. Harry observed that based on her experience, Ms. Parshley was "our best resource at collecting and analyzing" data from division managers. Mr. Harry also indicated that in regards to the company's imperative concerning safety, Ms. Parshley understood the importance of maintenance and prioritized projects and reports relating to maintenance activities.

In the fifth imperative of building a high performance culture, Ms. Parshley had developed a loyal staff. However, Mr. Harry believed she need to continue her efforts to "better manage certain challenging personalities in the division."

Mr. Harry's closing summary compliments Ms. Parshley as a "capable" manager with "good" technical skills. At the same time, he emphasized that Ms. Parshley's struggle with her relationships with division managers impeded her performance. To her improve her performance and enable further advancement within the company, Mr. Harry informed Ms. Parshley that she needed to "better manage" her relationships with division managers. Mr. Harry further noted that his comments were corroborated by the trends in a recent 360 degree feedback. While her customers gave her high marks in analytical ability, staff development, and integrity, they identified a weakness in "terms of communication with division management and other's view of" her customer commitment and respect for her customers. As a closing note, Mr. Harry acknowledged Ms. Parshley's recent efforts to improve the trouble relationships and looked for improved performance in 2001.

CX 2- Ms. Parshley 1999 performance appraisal, dated March 13, 2000, contains an overall rating of "meets expectations." Her supervisor, Mr. Hyland, praised Ms. Parshley as the "go to" person for financial matters and a key member of the Maintenance and Engineering team. He also stressed that she should "continue to develop a 'customer service' approach to dealing with occasionally conflicting priorities of her position." Additionally, Mr. Hyland emphasized that "communication and a positive approach" would assist Ms. Parshley's "continued rise in the

organization.”

CX 3 - An undated America West’s Mentor Program List indicates Ms. Parshley is being mentored by a senior vice president for planning.

CX 4 (also RX 10) - 360 degree Leadership Competency Feedback Form, dated December 26 and 28, 2000.⁷ On a scale of 1 to 5, Ms. Parshley received an overall score of 3.7. Her top score of 4.3 occurred in the area of drive for results, which placed her in the 50th percentile of the 333 participating managers. Ms. Parshley’s low score of 3.4 in communication, respect for other, and customer focus placed her in the bottom 25th percentile of the company’s managers. Notably, in the response break-out, Ms. Parshley’s customers gave her 2.8, 2.8, and 3.2 ratings, in the areas of customer focus, respect for others, and communication respectively, while her boss depicted her as a 4.0, 3.0, and 4.0 in those skills. For the same areas, Ms. Parshley rated herself as a 4.0, 5.0 and 4.0. In the written response portion, her customers recommended communicating with her customer base, eliminating last minute surprises, defining customer needs and fulfilling those needs, and working with all different personalities as development areas.

CX 5 (also RX 6) -360 degree Leadership Competency Feedback Form, dated November 2, 1999.⁸ Ms. Parshley’s overall score was 3.9. Her top score of 4.3 for analytical thinking indicated she stood in the 50th percentile of the 400 managers participating in the survey. In communication, she received a 4.0, placing her above the 25th percentile but below the 50th percentile. Her lowest score of 3.7 for the skills of developing others, customer focus (customers rated her a 3.3 in this area) and team leadership (customers rated her 3.0), placed her in the bottom 25th percentile for each skill. Ms. Parshley’s customer’s identified her strengths as analytical skills, integrity, and judgment, and maturity. Her direct reports, highlighted customer focus as a development area. Her customer’s emphasized that she should ensure Maintenance and Engineering recognized the her staff’s work.

CX 6 (also RX 33) - March 1998 job description for Financial Planning and Analysis Manager for Maintenance Operations. The incumbent manages a team of analysts responsible of analysis pertaining to the division. The manager prepares and monitors the annual operating plan and ensures accounting integrity.

CX 7, CX 8, CX 19, and CX 24 - May 2001 Severance and Release Program information sheet and release form. The company indicates that in response to a weakening economy, it must

⁷In CX 4, dated December 28, 2000, only the feedback portions for skills 4, 5, 6, and 10 are present. In RX 10, dated December 26, 2000, all the pages are intact. I also note that in both CX 4 and RX 10, the written comments are dated January 3, 2001.

⁸In CX 5, portions of the feedback breakdown for skills 4,5,6, and 10 are missing. RX 6 contains the entire survey. The comments sections of both surveys is dated November 11, 1999.

engage in cost-cutting measures to maximize its staffing dollars. As a result, based on financial and/or business efficiency considerations, some employees were being released from their positions. The cover letter indicates that as a person selected to release, the individual was being offered a severance package and career counseling. The release form indicates the individual agrees to voluntarily resign in exchange for a severance payment of over \$10,000. The agreement also contains a release of the company and a covenant not to sue. The release includes all claims for alleged discrimination.

CX 9 - Except from a May 14, 2001 e-mail indicates that part of the company's cost reduction measure includes a 10% reduction in management and administrative payroll. The payroll reduction would be accomplished through the combination of attrition, deferred hiring, and select reductions-in-force.

CX 10, CX 11, and CX 19 (also RX 4 and RX 15) - Ms. Parshley's July 1997 job application and job offer, and the May 2001 Separation checklist and associated paperwork. The Notice of Separation indicates a "layoff" due to lack of work/reduction in force. Ms. Parshley's last day of work with America West was May 2, 2001.

CX 12 - Job announcement, open April 11, 2001, for a capital projects manager for the Maintenance and Engineering Division.

CX 13 - Staffing requisition for a Finance Manager, Maintenance and Engineering Division, signed May 8, 2001 by the Division Controller, to replace Ms. Parshley. One of the listed minimum requirements is the ability to "negotiate and communicate effectively with all levels of management."

CX 14 (also RX 36 and RX 37) - E-mail message from "Namita" discussing Mr. Harry's presentation to Ms. Parshley's former group about her departure. Mr. Harry indicated Ms. Parshley was part of the headcount reduction and her departure was not a reflection on her.

CX 15 - E-mail message, dated June 7, 2001, announcing the arrival of Ms. Levy as the Financial Planning Manager for the Maintenance and Engineering Division. Her responsibilities include operating expense variance analysis, operating budget management and the inventory counting process.

CX 16 - Ms. Levy's December 17, 2000 application for a senior analyst position in the Finance Division. She lists as a strength, the ability to work with all levels of management. May 11, 2001 job offer from Mr. Harry to Ms. Levy for the position of Finance Manager with an annual salary approaching \$60,000. Ms. Levy accepts the offer on May 15, 2001.

CX 17 - America West's final reduction head count, updated May 8, 2001. The document shows several positions eliminated, from Senior Director Operations Planning (apparently held by Mr. Hyland) to contract sales manager. Ms. Parshley position, Manager, Maintenance and Engineering Finance, is not listed as eliminated. Instead, the document reflects a deferred hiring for that position

of eight months. The organization chart for Operations Planning shows the Senior Director of Operations Planning position being eliminated (apparently along with Mr. Hyland) and Ms. Parshley removed from the Manager, Contracts and Warranties position. The personnel count for Operations Planning, headed by Mr. John Wilson, is reduced by two from 43 to 41.

CX 18 - Handwritten notes from January 22, 2001 to April 24, 2001. One page annotates a 10% budget cut with a 5% head count reduction. Another note references a 5% RIF. Another comment states, "How do we delete a head w/out the position?"

CX 20, CX 32, and CX 33 - Assorted payroll records. Ms. Parshley was hired August 11, 1997 and received either a merit pay increase or a promotion increase in 1998, 1999, 2000 and 2001. She moved from senior analyst to finance manager in April 1998.

CX 21 - America West's Progressive Counseling Policy, dated January 1998. The policy's purpose is "to provide effective and equitable administration of correction action among employees for... unsatisfactory job performance." The policy sets out "general direction" for management. The first step in the process involves a verbal counseling. The second step is a corrective action discussion ("CAD"). If after the CAD process, an employee's performance remains unsatisfactory, then the individual may be terminated. Notably, the policy indicates that in some situations, involving serious violations of America West's Code of Conduct, the corrective action steps may be bypassed and immediate dismissal may occur. Further, the CAD process states, "Management employees will not be accommodated in a lower-level position in response to substandard job performance."

CX 22 (also RX 42) - E-mail correspondence from Mr. Stanton to Ms. Parshley, dated August 7, 2001 and March 26, 2002. In the first message, Mr. Stanton indicates that he looked for the files of the "transactions we had discussed and couldn't find them." All his files had been deleted. Mr. Stanton states, "I know all the transactions were done in the second and third week of November, last year." He believes "the return of material should be an issue" since the stock clerk must use a supervisor's number to do the inspection transaction, the third step in returning materials. Mr. Stanton recognizes the problem with using "an issue" to correct the bin quantity. "People just don't know how to use the system." Finally, he reports that he hasn't seen any FAA inspectors around and no one in the warehouse has mentioned anything.

In the second message, Mr. Stanton reports that "things are starting to happen at work." Mr. Harry informed him that a company lawyer would call him but he wasn't on the company's witness list. Concerned about Ms. Parshley's request for Mr. Stanton to be a witness, he reluctantly requested to be subpoenaed so "it wasn't my choice to testify." He intends to tell the truth which he believes will not help the company's case.

CX 23, CX 24, and CX 37 (also RX 38 to RX 40, RX 43, RX 44, and RX 51) - Ms. Parshley's correspondence with the FAA. In a May 25, 2001 e-mail message to Mr. Ingram at the FAA, Ms. Parshley expresses her suspicions that she was really terminated because she had potentially damaging information to the airline. From one of her employees, she had learned that

aircraft parts were not being correctly received into the warehouse. According to Ms. Parshley:

All parts which were either initially received into the warehouse, or returned from line or heavy maintenance, are required to be inspected by authorized receiving inspectors. It is my understanding that if these parts are not correctly received, they may in fact not be legal to be on the aircraft.

Ms. Parshley indicated that because the employee had previously worked for the FAA he was aware of the significance of this oversight in the company's material handling function. She reported the information to her supervisor who agreed it may be significant. But, she was terminated while in the process of gathering information on the parts not being received correctly. A few days before her termination, she expressed to her supervisor an intention to give the information to the Director of Quality.

According to Ms. Parshley, her biggest concern was that she had discovered something that was more serious "than even I realized" and it would not be rectified. Acknowledging that as an accountant, she was not an expert in the area, Ms. Parshley believed the oversight may be serious based on her experience as a pilot. So, she wanted Mr. Ingram's help in notifying the proper authorities.

Finally, Ms. Parshley mentions that she has retained a lawyer who believes the termination may be due in part to the information she has about the parts. So, Ms. Parshley queries, "If the material handling oversight that I discovered is serious, is the FAA able to help assist me in taking action against the airline for retaliation?"

In a July 31, 2001 letter to Mr. Haeggquist of the FAA, Ms. Parshley details her recollection of the inventory oversight. At the end of March 2001, Mr. Gene Stanton notified Ms. Parshley that some aircraft parts had not been properly processed into the warehouse. The processing of parts involves three steps: receipt, inspection, storage (placement in a bin). "Mr. Stanton informed me that a series of parts were received into the warehouse in November 2000; however, the required inspection and binning process had not been completed." According to Mr. Stanton, when the warehouse personnel discovered the transactions had not been completed, an individual completed the missing entries in the computer system without doing an inspection or confirming the storage. In other words, he put the transactions in the computer as if the parts had been properly inspected. Ms. Parshley reported to problem to Mr. Harry and indicated that she intended to run a computer report that would document these transactions. She told Mr. Harry that she would pass the report on to the Director of Quality. Ms. Parshley was not able to accomplish the report due to her May 2, 2001 termination. Prior to her termination, Mr. Harry assigned her projects of "higher" priority and her office also had a staffing shortage. Ms. Parshley believed that if the report were run, the focus should be on the binning and inspection transactions in March 2001 with receiving entries traced to November 2000. Finally, Ms. Parshley expressed her opinion that "it is possible for parts to be made available for use" due to such inventory adjustments. Mr. Stanton believed the parts had been available.

In an August 2001 letter, Ms. Parshley indicated about 800 parts were involved in these transactions. The parts had been issued out of the warehouse and then returned over a period of time. Mr. Stanton discovered that the parts had been incorrectly processed. Not all the transactions had been entered correctly into the computer and had been returned to the shelves causing an inventory count discrepancy.

On August 27, 2001, the FAA informed Ms. Parshley that their review of the material handling process found America West in compliance. All returned or repaired parts are to be accompanied by a valid work code attached to the serviceable tag in order that items are returned to stock. This function is accomplished by a stock clerk.

CX 24 and CX 37 (also RX 20, RX 31 and RX 32) - Ms. Parshley's AIR 21 complaint to the Secretary of Labor with numerous attachments⁹ and Regional Administrator's response. After explaining the three steps for processing parts, Ms. Parshley then recounted her conversation with Mr. Stanton. In November 2000, a series of parts were received. Although the requisite inspection and binning processes were not completed, the parts were placed in storage and made available for use. In March 2001, a third shift supervisor completed the inspection and binning computer entries for the parts without completing the actual FAA required inspection or verifying the parts were still in the bins. Because the entries had the effect of adding parts to the computer inventory, the inventory would have to be adjusted downward by about \$100,000 to match the physical inventory. Rather than the inventory issue, Ms. Parshley was concerned, based on her pilot experience, that the company was not properly inspecting the parts. She knew serviceable parts must have an airworthiness tag to be returned to service after maintenance. When Ms. Parshley questioned Mr. Stanton about the seriousness of the oversight, he agreed. Mr. Stanton further indicated, he had observed unused parts being returned to the warehouse without receiving proper inspections.

Within 24 hours of her discussion with Mr. Stanton, Ms. Parshley "told Mr. Harry that she was concerned that the airline had a significant deficiency in their receiving process" and that she was going to have an analyst run reports to document the improper transactions. Over the next few weeks, Ms. Parshley expressed her concern to Mr. Harry that other deficiencies existed. For example, she was aware that supervisor computer passwords were not being properly protected. She intended to find computer entries during periods when the supervisors were not on duty.

When Mr. Harry terminated Ms. Parshley, he gave unspecified "issues" as the basis for her selection for separation. He indicated that she had a lack of respect for the corporate environment and that her position was being eliminated. However, Mr. Harry later hired someone to fill her position.

Later, in conversations with FAA representatives, Ms. Parshley expressed her belief that the

⁹One version of Ms. Parshley's complaint was received by the Secretary on July 13, 2001. Some of the attachments refer to other potential safety-related incidents that are not the subject of Ms. Parshley's present complaint.

receiving inspection process was more than an accounting function. It was improper for a warehouse supervisor to make the computer entries without inspecting the parts.

On December 14, 2001, the Regional Administrator issued his determination that Ms. Parshley had not established illegal discrimination under AIR 21. Although finding she engaged in a protected activity, the administrator found Ms. Parshley was separated as part of a legitimate reduction in force and corporate reorganization.

CX 28 - September 1, 2000 CAD issued by Ms. Parshley to one of her employees.

CX 29 and CX 30- Various e-mails documenting Ms. Parshley's attempts to find work and an Unemployment Compensation Summary records Ms. Parshley's receipt of \$2,665 in unemployment compensation.

CX 31 - 2001 Federal Tax Return showing \$33,276 in wages and \$2,665 in unemployment receipts.

CX 37 - Various America West documents from Ms. Parshley's deposition including Ms. Parshley's self development plan and the company's development handbook.

CX 38 - April 1, 2002 deposition of Mr. Craig C. Harry. In May 2001, Mr. Harry was the Director of Finance for the Maintenance and Engineering Division of America West. He worked for Mr. Wilson, Vice President of Operations, Planning and Analysis. He began supervising Ms. Parshley in August 2000 when he replaced Mr. Hyland. In his opinion, Ms. Parshley had "pretty good" technical accounting skills but struggled with interpersonal relationship within the finance group and outside the organization with other business managers. As a example, one of her employees talked to him in March 2001 about her excellent appraisal by Ms. Parshley because she thought she was going to be fired. That incident caused him to be concerned about whether Ms. Parshley was providing sufficient feedback. On another occasion, an applicant expressed a reservation about joining her group because Ms. Parshley was known to be difficult. Mr. Harry doesn't recall discussing these incidents with Ms. Parshley. Finally, another of Ms. Parshley's employees who had been subjected to the CAD process for poor performance talked to Mr. Harry at the time of her resignation from the company about Ms. Parshley's management style. Specifically, Ms. Parshley gave poor instructions and directions. Mr. Harry had supported the CAD action based on Ms. Parshley's recommendation. However, after his conversation with the separated employee, he became less sure of Ms. Parshley's opinion in the matter.

Prior to moving to his job in August 2000, Mr. Harry had heard from two vice presidents that Ms. Parshley might be a challenge and that her finance group appeared to be struggling. During the restructuring, Ms. Parshley was terminated because he had concluded in late April 2001 that his group was not performing well and a large reason was the break down of communication between Ms. Parshley and other maintenance managers. Some of the managers who had rendered specific complaints included Mr. Radke, Mr. Martin, and Mr. Seymour. All three managers expressed

concern about how the financial group was working with them. He concluded Ms. Parshley was no longer an effective manager with the other players in the maintenance organization. All these factors came to together when Mr. Harry was challenged by the events of April 2001 to make his group perform better.

Specifically, Mr. Radke approached him in the fall of 2000 with complaints about the ineffectiveness of Ms. Parshley's group and its inability to help his business. His engine maintenance group repeatedly experienced difficulty in obtaining historical engine maintenance costs from Ms. Parshley's team. Additionally, the finance group had lost or destroyed old cost data relating to engine maintenance. Mr. Radke raised the issue several times. Eventually, Mr. Harry became a go-between. Mr. Radke would ask him for information and Mr. Harry would then obtain the data from Ms. Parshley's employees. His role was only an interim solution until he could make a change in management. Mr. Radke and Ms. Parshley had a personality conflict and barely spoke to each other. When Mr. Harry discussed the engine plant's concerns with Ms. Parshley, she expressed opinions about that organization's short comings. Eventually, based on communication complaints from other individuals, he concluded most of the problem belonged to Ms. Parshley.

Mr. Martin manages the approval of engineering work orders. He expressed his opinion to Mr. Harry that the finance group overstepped its authority in the way it enforced budget approval of engineering work orders. Notably, Ms. Parshley would have unbudgeted work deleted from the engineering work order without informing Mr. Martin. Mr. Harry was not concerned about pulling the un-budgeted work, but he did think the failure to notify Mr. Martin of the action was a problem. Eventually, Mr. Harry changed the process so that engineering group was aware of a budget problem. When he discussed the situation with Ms. Parshley, Mr. Harry got the impression that she took action on engineering work orders without a concern for the consequences or any communication. Mr. Harry does not know whether Ms. Parshley was following instructions given to her before his arrival.

According to Mr. Seymour, his material group found the finance organization difficult. In his opinion, Ms. Parshley did a better job issuing instructions than in supporting his organization. He made this complaint in late 2000 or early 2001. As a result, the material group starting passing requests through Mr. Harry, who became a facilitator.

Mr. Harry is aware of the CAD process but prefers a more informal setting to discuss performance issues. However, he didn't do a CAD with Ms. Parshley. Rather, he covered the issues in the process of accomplishing her evaluation. Mr. Harry acknowledged that the CAD process may have been appropriate for Ms. Parshley given enough time.

Ms. Parshley expressed concern about some of the scores in her 2000 360 degree survey that were relatively low. Some of the inputs came from her customers such as Mr. Radke, Mr. Martin, and Mr. Seymour. While Mr. Harry understood Ms. Parshley's concerns, the evaluations from her customers are very relevant. Some of her scores placed in the 50th percentile or lower of all

managers. Mr. Harry did consider the results of this survey in determining whether to remove Ms. Parshley. On a scale of 1 to 10, Mr. Harry would rate Ms. Parshley's effectiveness as a 3.

Mr. Harry first discussed Ms. Parshley's communications problems with her in January 2001. He again addressed her performance with her when presenting the March 2001 appraisal because he believed the communication problem belonged to Ms. Parshley. In mid-April 2001, he discussed his consideration about terminating Ms. Parshley with Ms. Prelog. As part of his challenge to improve performance, he had identified Ms. Parshley's termination as a change to meet that challenge. Mr. Harry passed his recommendations for his group, including the departure of Ms. Parshley, to his supervisor, Mr. Wilson, by telephone. Sometime later, Mr. Wilson indicated that Mr. Seymour had complained to him about her performance. Mr. Wilson also stated that he agreed with Mr. Harry's decision and approved the action.

In making his termination decision, Mr. Harry did not consider her 1999 appraisal because he preferred to use his first hand experiences.

Mr. Harry did not discuss with Ms. Parshley his recommendation to terminate her due to instructions not to discuss the terminations prior to the formal notice. Prior to Ms. Parshley's termination, he did have some discussions with her about the general effect the restructuring might have on the group.

Absent the company's restructuring in April 2001, Mr. Harry likely would have elevated Ms. Parshley's problems to the CAD process. Ms. Parshley is the only employee he has separated while working at America West. He would not bring her back into his finance group even though her strengths are technical skills and interest in the airline industry.

Mr. Harry knew of Ms. Parshley's sexual harassment complaint but was not aware of the individuals involved. He also was aware that Mr. Martin had experienced cost over runs in the flight recorder project.

In the meeting with Ms. Parshley on May 2, 2001, Mr. Harry told her that she was being let go as part of the restructuring. He doesn't recall telling Ms. Parshley that her position was being eliminated.

When Mr. Harry informed Ms. Parshley's group about the action, he indicated the termination was part of the restructuring and accomplished for business purposes. A portion of the group expressed their surprise at her removal.

After reviewing her resume, Mr. Harry interviewed Ms. Levy for the capital manager position in the finance group in the spring of 2001. Mr. Harry decided to hire her and circulated the staffing approval form sometime after Ms. Parshley departed the company. He hired Ms. Levy to perform many of the functions associated with Ms. Parshley's job because he still had a need for the functions to be accomplished. At the same time, her responsibilities are sufficiently different such that Mr. Harry does not consider Ms. Levy a direct replacement for Ms. Parshley. Mr. Harry informed Ms. Levy of her selection in mid-May 2001.

In the fall of 2001, Mr. Harry read Ms. Parshley's allegations and met with Ms. Prelog prior to the company's response to the EEOC and DOL complaints. He also reviewed the company's response. In his discussions with Ms. Prelog, Mr. Harry explained that Ms. Parshley's termination was related to his concern about the finance group's ineffectiveness.

Mr. Harry knows Ms. Parshley alleges she was terminated because of her disclosure of irregular events involving inventory receiving processes. Mr. Harry vaguely recalls one conversation between them in early 2001 about inventory receiving. Ms. Parshley told him how a group of materials were received, or went through the receiving process. He doesn't recall whether she mentioned an intention to follow up or to report it to Ms. Gray. Mr. Harry doesn't recall any specific concern that he had beyond that typically associated with a routine discussion.

Mr. Harry has an open management style. He empowers his employees by setting only parameters and priorities and then expecting them to manage their business. Mr. Harry requires them to interact well with all parts of the business, including superiors. Since Ms. Parshley's departure, America West went through another restructuring. In that process, Mr. Harry had to terminate other employees.

Sworn Testimony

Ms. Sherry Parshley (TR, pages 45 to 188)

Ms. Parshley, the Complainant, was a Finance Manager for America West. Her duties included financial planning, analysis and forecasting. She also held responsibility for warranty administration and inventory control.

On May 2, 2001, she was called into Mr. Harry's office. Present were Ms. Prelog and Mr. Harry. At that time, Mr. Harry stated her position was being eliminated in the workforce reduction. When she inquired why, Mr. Harry responded that she knew what the issues were. Ms. Parshley indicated she didn't know about any issues and Mr. Harry replied that she knew about the issues. Ms. Prelog, expressing surprise that Ms. Parshley had been selected, agreed with Mr. Harry that reason for her termination was a work force reduction. Mr. Harry indicated that her staff would report directly to him. The meeting lasted 20 minutes.

Ms. Parshley was surprised by her selection for the workforce reduction. However, the Chairman of the company announced around April 20th that America West would undergo a cost reduction program which would include a reduction in the work force of 10% of the administrative group. RX 14 is the Chairman's announcement about the cost reduction program.

Over the next ten days after the announcement, Ms. Parshley and Mr. Harry discussed how the department would handle the reductions. They decided to leave an inventory control specialist and manager of capital positions open as part of the reduction. They preferred using that method rather than have someone lose their job. Mr. Harry stated no one in the department would be affected except the two open positions. Mr. Harry never indicated that Ms. Parshley was also being

considered for separation.

According to Ms. Parshley, the first step an America West manager takes with a performance issue is a documented, verbal discussion with the employee. During the discussion, the unsatisfactory issue is covered, expectations are stated and assistance is offered. This first discussion is annotated by a note in the employee's file. This procedure is set out in the company's administrative policy manual. The second step in dealing with a performance problem is a formal CAD. In a CAD, the corrective steps taken in the initial counseling are set out this time in writing. Ms. Parshley believes the purpose of this approach is to give an employee an opportunity to improve performance. Additionally, the documentation establishes that the manager followed the procedures. Ms. Parshley recalls issuing three CADs and believes Mr. Harry reviewed one of them and was present for the discussion with a different employee.

Although never the subject of a CAD, Ms. Parshley did recall two separate discussions with Mr. Harry about her performance. In January 2001, Mr. Harry discussed the results of the annual 360 degree feedback evaluation with her (CX 4). While the report contained a lot of good comments, Mr. Harry was concerned about a few of her professional relationships. In response, Ms. Parshley expressed her belief that a couple of the customers who provided feedback were not being objective. The feedback process had started in September 2000 with the selection of customers to provide feedback. At that time, she expressed to Mr. Harry, who was then new to the department, her concern that two of the potential customers would not be objective. She had previously reported one the senior director customer's overspending on a flight data project. In that case, the Board of Directors had approved \$2 million but the senior director actually spent \$4 million. After her report, her relationship with that director, Mr. Martin, became adversarial. The other person, Mr. Radke, was just a challenge. Mr. Harry agreed to consider the objectivity issue when the responses came in. In her conversation with Mr. Harry, although they recognized the objectivity problem with some of the customers' feedback, he indicated the importance of getting along with all the customers and trying to develop good relationship. Mr. Harry admitted he also found some of the individuals challenging. Mr. Harry did not discuss any specific performance complaints that he may have received from Mr. Martin, Mr. Radke, Mr. Seymour. In fact, she was unaware of any job performance problems concerning her.

Ms. Parshley and Mr. Harry had another similar discussion in mid- March 2001 during her performance review. At that time, he covered his written comments in the performance report. They also discussed her advancement into other areas of the company. Such experience was needed to move up to a director position. He also referred back to their January 2001 conversation about relationships and acknowledged her attempts in developing those relationships. Mr. Harry expressed his optimism for a positive outcome and stressed the importance of that outcome in a move to a director position. That is, to be a director, Ms. Parshley would have to be able to work with people at all levels.

Neither discussion gave her the impression that the next step would be a CAD for her. Mr. Harry never indicated that her job was in jeopardy.

CX 1 is her performance appraisal, dated March 15, 2001. As part of the evaluation process,

she had drafted parts of the report. Mr. Harry incorporated many of her draft comments. On page three of the report, Mr. Harry observed that she had more responsibility than her peers. He also complimented her on the monthly meetings she initiated with other departments. Further, Mr. Harry again stressed the importance of improving her inter-department relationships if she planned to move up in the company. Mr. Harry gave no indication that her relationship management was unsatisfactory. He did not indicate that the relationship issue rose to the level of a performance problem. At the conclusion of the meeting, Mr. Harry thanked her for helping him get up to speed in the department and expressed his respect for her conduct in the division, despite some challenging individuals. He indicated that overall she was meeting manager expectations. Mr. Harry specifically complimented her for recognizing the impact maintenance has on safety compliance and prioritizing projects and reports.

Discussions after March 15th about her performance with Mr. Harry involved good observations.

Mr. Harry became her manager in August 2000. Prior to that time, Ms. Parshley worked for Mr.

Shannon Hyland. Mr. Hyland never informed Ms. Parshley of any complaints from division managers and had also rated her as meeting expectations overall.

Concerning her safety issue complaint to Mr. Harry, Ms. Parshley commented that aircraft parts must have serviceable tags which indicates the part has been serviced and is legal for a particular airplane. In the middle of March 2001, Mr. Gene Stanton, an inventory control specialist, informed Ms. Parshley that over 800 aircraft parts had just been entered into the material handling record keeping system by Mr. Liberio as being inspected without verifying completion of the inspections. As an inventory specialist, Mr. Stanton counts aircraft parts actually in the company's warehouse and compares the result with the supply system computer record. Mr. Stanton discovered the problem while investigating inventory discrepancies. Mr. Stanton reported the problem to her because of the potential financial impact. By questioning Mr. Stanton, Ms. Parshley learned that the completion of the inspection had been confirmed prior to the computer entries. Mr. Stanton had also discovered some parts without serviceable tags. Mr. Stanton indicated he was making the report to Ms. Parshley because of the significant difference in the parts count which might have a financial impact and because the inspections were not actually verified.

As Ms. Parshley understood Mr. Stanton, a material handling employee had entered a list of 800 parts into the parts computer system and made all the receiving and storage entries at the same time. The parts had initially entered the warehouse in November 2000 but the last two entries involving inspection and binning were completed in March 2001. Ms. Parshley never talked directly with the material handling supervisor.

Ms. Parshley explained that when a aircraft part comes into the warehouse, it is suppose to go through an inspection process which includes determining whether the item has the proper serviceable tag and paperwork. According to the FAA, the parts need a serviceable tag to be placed on an aircraft. Ms. Parshley's concern focused on whether the inspection had been properly documented prior to the part's entry into the active inventory system.

Because Ms. Parshley believed the problem identified by Mr. Stanton was both a safety issue and a breach of inventory control procedures, she informed Mr. Harry about the problem about an hour later. Since Mr. Harry was not familiar with the process, Ms. Parshley took some time to explain the problem and why the serviceable tag was important. Ms. Parshley knew about the importance of the serviceable tag from a discussion with the Director of Quality, Ms. Sharon Gray. About six months earlier, Ms. Gray had been adamant that only the appropriate personnel were to complete the inspection process with proper supervision.

Ms. Parshley is also an aircraft owner and a private pilot (after leaving the company, she obtained a commercial pilot license and an instructor license). Ms. Parshley expressed to Mr. Harry her intention to bring the inventory matter to Ms. Gray's attention once she had the necessary documentation. She told Mr. Harry that "it could potentially be a very important safety concern." Mr. Harry nodded yes in response and agreed that it would make sense to get all the documentation prior to seeing Ms. Gray. To obtain the documentation, Ms. Parshley planned to obtain a report from the material handling system to show the parts were brought into the warehouse several months prior to the inspection and receiving process. Mr. Harry never told Ms. Parshley not to report the parts discrepancy to Ms. Gray or the FAA.

Ms. Parshley did not go to Ms. Gray directly because she didn't like to speculate. Instead, she wanted to have the documentation before she proceeded. She didn't want to raise safety concerns unless she was certain about it.

She also told Mr. Harry of her intention to investigate whether supervisor passwords were being misused. That is, since supervisors had receiving inspection authority, Ms. Parshley wanted to see if someone else was violating a company policy by using a supervisor password inappropriately. She intended to gather more information and then report the problem to the Information Technology Department. Ms. Parshley does not claim this report as a reason she was fired.

After being fired, she contacted the FAA. When the FAA later investigated the service tag issue, Ms. Parshley informed them that the problem was a parts receiving record keeping discrepancy. She was not in a position to state whether the parts were on the shelves without the requisite service tag. Instead, she believed an inspection would disclose that the receiving inspection process had not been accomplished in conjunction with the record keeping entries. It was up to the FAA to determine whether there was a legal problem. The FAA investigation consisted of two inspectors visiting the warehouse for less than an hour. The inspectors were told the company was following proper parts maintenance procedures. All the parts they reviewed were in compliance (RX 44). They couldn't investigate the 800 parts.

After the mid-March conversation about the aircraft parts, Ms. Parshley discussed it a couple more times with Mr. Harry when she was assigned other projects. She thought the part inventory research should be a priority because unless the problem was addressed, it would continue. Mr. Harry stressed that she needed to work on the financial matters. Ms. Parshley was never able to do the research because she was assigned other tasks and for about a third of that time the person who

had the ability to generate the report was out ill. She last talked to Mr. Harry about the inventory research in the latter half of April, about 10 days before she was fired.

Ms. Parshley filed her whistle blower complaint with the U.S. Department of Labor before the EEOC issued its right to sue letter concerning her sexual harassment complaint. However, the first complaint Ms. Parshley made against America West involved sexual harassment.

Ms. Parshley believes she was fired for reporting to Mr. Harry the improper inventory of 800 aircraft parts. Notably, the only incident between her mid-March 2001 performance appraisal, where she was meeting expectations, and her termination on May 2, 2001 was the inventory discrepancy report to Mr. Harry.

Since leaving America West, Ms. Parshley has asked Mr. Stanton to locate any file material about the inventory problem. He has not been able to produce any documentation. When he went to the warehouse to retrieve the file, Mr. Stanton found the information had been deleted.

Ms. Parshley was outspoken at work and had voiced concern about other safety problems at the company with Mr. Harry.

When Ms. Parshley arrived at America West as a financial planning analyst, she prepared a personal development plan to assist her advancement in the company. Within eight months, the company promoted her to manager of financial planning. Later, she received increased responsibilities with several corresponding merit pay increases. When she was terminated at America West, her salary was about \$67,275.

Since being fired in May 2001, Ms. Parshley has been looking for a job in financial planning, accounting, and teaching. Ms. Parshley has had several interviews since then and experienced limited success as a teacher, teaching a few more on-line classes in finance, accounting and economics than she had taught while working for America West. She earns a couple thousand dollars a class. She also has received unemployment compensation. Finally, Ms. Parshley has earned about \$400 as a flight instructor.

Ms. Parshley has a Bachelor's Degree in economics and business and a Master's Degree in Business Administration.

Ms. Parshley refused to sign a severance package because it contained a statement saying she was voluntarily resigning. The package also contained a no-reinstatement clause and a claims release provision.

Prior to coming to America West, Ms. Parshley's employment had been in finance and accounting. She had no experience with the inspecting or receiving parts. Likewise, her job at America West did not require knowledge of Federal Aviation Regulations. Her most recent job with America West was titled Financial Manager. In that position, she managed financial reporting, forecasting, and development of the annual capital and operating budgets. The description in RX 21 describes the duties she was assigned for the first year after her promotion to manager.

Receiving parts was not part of her job.

Concerning Mr. Martin, at the direction of her supervisor at the time, Mr. Hyland, Ms. Parshley pulled some bills of engineering work from Mr. Martin's department that were not in the approved budget and informed only his project managers and engineers. Had Mr. Martin requested to be informed of these actions, Ms. Parshley would have told him.

Mr. Alfred E. Stanton (TR, pages 188 to 240)

Mr. Stanton, now a senior aircraft analyst, was an inventory control specialist in the fall of 2000 and spring of 2001. At that time, he was engaged in the cycle counting program which involves reconciling the physical count of parts with the computer inventory of parts. The process helps ensure that if the computer says a part is on the shelf that it is actually on the shelf. It has accounting, aircraft support, and safety purposes - if a mechanic needs a part to fix an aircraft, there could be a safety issue. At the same time, the principal purpose was to have an accurate inventory.

In November 2000, Mr. Stanton informed Ms. Parshley about an inventory problem related to a change in computer systems that occurred a couple of years prior. After completing a physical inventory of the parts warehouse, Mr. Stanton discovered an imbalance with the computer parts inventory. Since the new computer had been put in place, many parts had been issued, then returned to the warehouse to be put back in stock but not all the computer data had been completed. As a result, there "were more quantities on the shelf than the system said." Mr. Stanton talked to the warehouse supervisor about the queue of about 800 parts that needed completed transactions to be cleared out. They decided to do some "pretend" transactions of first completing the computer entries to place the parts in stock and then issuing them out in order to get the correct count for the part bins. Part of the pretend stock transaction involved completing the inspection and binning entries. In November 2000, Mr. Stanton informed Ms. Parshley about the problem and these transactions so that she would understand the gyrations in the system.

In March 2001, while doing another physical count of parts, Mr. Stanton found that in making the adjustments to correct the November 2000 inventory imbalance, the computer inventory had become inflated apparently because after the computer transactions had placed the parts into stock not all the corresponding pretend transactions to issue the parts had been accomplished. Mr. Liberio, one of the warehouse supervisors, had not made all the issue transactions. The problem of the 800 parts or so was essentially an accounting issue and did not involve whether those parts had proper inspections. RX 3 shows that the financial impact of this inventory imbalance was about \$182,000. He reported this problem to Ms. Parshley so she would understand the accounting issue.

During his employment as an inventory specialist, Mr. Stanton has also observed another completely separate problem in the warehouse. On a few occasions, he found some parts or material on the shelves that did not have an FAA required serviceable tag. That troubled him because part of the process of putting a part on the shelf involved an inspection that indicates the part is

serviceable and that inspection should be done by a person qualified. However, at America West the function had been turned over to a stock clerk. Mr. Stanton spoke at least once to a warehouse supervisor about the problem but the supervisor wasn't concerned about the practice as long as the parts had the proper documentation. Sometime between November 2000 and "surely by March 2001," Mr. Stanton also told Ms. Parshley about this issue.

Mr. Stanton acknowledged that when a mechanic receives a part "he's the final determination of whether it's a serviceable part." In other words, he'd expect the mechanic to require a serviceable tag.

Mr. Stanton was surprised when Ms. Parshley was fired because she had been doing an excellent job, especially on the budget. He did not know the contents of her discrimination complaint.

Mr. Thomas S. Cokely (TR, pages 242 to 249)

Mr. Cokely lives with Ms. Parshley and has observed her re-employment efforts. She utilized the newspaper, internet, and personal contacts for job leads. She followed up on job leads, sent out cover letters and resumes. Unfortunately, the economy changed in April 2001 and the local job market dried up.

Respondent's Case

Documentary Exhibits

RX 1 and RX 30 - Late August 2000 statement by Mr. Steve Ford expressing his complaints about Mr. Radke's reference to him as a marginal employee and Ms. Parshley's negative attitude towards him. After four weeks as her employee, Mr. Ford resigned his position finding Ms. Parshley's behavior unacceptable.

RX 3 - Undated printout showing about \$182,000 adjustment for expendable and repairable parts.

RX 5 - January 1999 360 Degree Feedback Survey. Ms. Parshley's scored the highest for analytical thinking with a 4.24 rating. Her low score was 3.77 for developing others. In communications and customer focus, she received a 4.02 and 3.96. On the survey chart, Ms. Parshley's supervisor and customers, nearly always rated her lower than her peers or herself. Her supervisor stressed as improvements areas respect for other people's opinions and tolerance.

RX 7 - Performance Appraisal for 1998, dated March 24, 1999.¹⁰ Her supervisor, Mr. Jarvie, gave Ms. Parshley an overall rating of "meets expectations." He complimented her timely responses to management and suggested more focus on team building and improving relationships across

¹⁰The appraisal indicates a review period of April to December 1999. This is clearly an administrative error since the parties signed the report in March 1999 and the comments address Ms. Parshley's performance in 1998.

department boundaries. In specific skills areas, Mr. Jarvie noted her strengths in many categories, mostly related to technical skills and drive. At the same time, he observed some weakness in handling professional discontent and treating others with respect.

RX 8 - DOD approval of America West's continued participation in the DOD Air Transportation program, dated March 15, 2000.

RX 9 - Leadership survey feedback, November 2000. In almost all the categories, Ms. Parshley was rated as having leadership strengths. However, as an improvement area, the form indicates she should "continue to develop a positive relationship with other business managers that may have a differing point of view to her own."

RX 11 - January 2001 draft performance appraisal for Ms. Parshley reflecting as an improvement area continued development of relationships and communication.

RX 12 - Handwritten annotations to the January 2001 draft appraisal. In the exceeds customer expectation section is a comment that Ms. Parshley still struggles with her relationships with other division managers.

RX 14 - E-mail message from Mr. Franke and Mr. Parker to all America West employees, dated April 18, 2001, announcing the cost reduction program. Part of the program included a 10% reduction in management overhead accomplished through attrition, deferred hiring, and selective reduction in force.

RX 16 and RX 19 - Ms. Parshley's May 2001 sexual harassment complaint and EEOC disposition.

RX 21 - America West's August 2001 response to Ms. Parshley's AIR 21 complaint. The company asserted that its material handling personnel received training and are properly classified according to FAA regulations. The Quality Assurance Department never received a safety complaint from Ms. Parshley and Mr. Harry did not receive such a complaint. During the restructuring, managers selected 120 to be affected. Their selection was based on job performance, skills, company need, productivity, operations, and tenure. Ms. Parshley was selected due to her poor leadership within her work group and substandard work relationship with her customer clients. Mr. Harry had previously, verbally discussed these problem with Ms. Parshley. The issues were also identified in 360 degree surveys. After her departure, some of the responsibilities associated with her position were changed and an outside candidate was brought in.

RX 22 and RX 30 - Mr. Harry declared on October 16, 2001 that Ms. Parshley never made any complaints about safety concerning the receiving, inspection, or entry of parts in the warehouse. He recalled no safety related conversations with Ms. Parshley. Her separation was based solely on her unsatisfactory performance as a manager.

RX 23 and RX 30 - Mr. Radke declared October 17, 2001 that he complained to Mr. Harry several times about Ms. Parshley's general attitude that it was not her job. As an example,

historically, the person in her position would track engine expenditures from received invoices. Ms. Parshley decided not to track these expenses because it was not her job. She told Mr. Radke to do it himself. In the absence of proper expense tracking, he was not able to actually budget his group's expenditures. Since her departure, the finance group once again tracks the expenditures. Mr. Radke found Ms. Parshley unresponsive to finding solutions.

RX 24 and RX 30 - Mr. Seymour declared on October 18, 2001 that he complained to Mr. Harry several times about Ms. Parshley's unresponsiveness to his inquiries. Eventually, she became unapproachable so that he had to bypass her to get things accomplished. People on her staff were worried about retaliation from her if they dealt directly with Mr. Seymour or his staff. He experienced the process as unproductive. After her employees were told not to provide information directly to Mr. Seymour, he found her resistant to accommodating his requests.

RX 25 and RX 30 - Ms. Allison Burton declared on October 18, 2001 that she complained to Mr. Harry about Ms. Parshley on several occasions. She was concerned about working for Ms. Parshley due to her observations of Ms. Parshley's interaction with others during meetings. Ms. Parshley did not have good management skills or communicate well with her customers.

RX 26 and RX 30 - Mr. Martin declared on October 18, 2001 that he complained to Mr. Harry about Ms. Parshley several times. Initially, Mr. Martin and Ms. Parshley had a good working relationship. However, over the ensuing months she became unhelpful and uncooperative. His concerns grew steadily. She increasingly impeded his efforts to accomplish safety and reliability aircraft modifications. Several times, she had specific work pulled from scheduled maintenance due to budget problems. Her process delayed and disrupted the completion of the modifications.

RX 27 and RX 30 - On October 18, 2001, Mr. John Chapman declared that he expressed serious concerns about Ms. Parshley with Mr. Harry. She seemed unable to feel confident with her subordinates and micro-managed everything. She demoralized the warranty team. She also directed her employees not to communicate with anyone who was a manager or above outside the department without her written permission. He found this order particularly disruptive of his work.

RX 28 and RX 30 - On October 19, 2001, Ms. Namita Vaidya declared that though a friend of Ms. Parshley, she once complained to Mr. Harry about Ms. Parshley's reaction at a staff meeting about something Ms. Vaidya forgot to accomplish.

RX 29 and RX 30 - An additional America West response, in October 2001, to Ms. Parshley's complaint providing names of individuals who could verify Ms. Parshley's performance. Ms. Prelog, who prepared the response, also asserted the Ms. Levy's role was changed considerably from the role Ms. Parshley had played in the finance group. Most of the customer now received proper service from Ms. Levy. The company was unaware of any conversations Ms. Parshley had with any employee about inventory control problems. During the restructuring twenty managers, five directors, one senior director, and one vice president were separated from the company.

RX 34 - The seven customers for Mr. Parshley's 360 degree leadership survey in the fall of

2000 included Mr. Martin, Mr. Radke, and Mr. Seymour.

RX 35 - Apparently, Ms. Parshley's last payroll summary from America West.

RX 45- Ms. Parshley's August 27, 2001 letter to DOL responding to some of America West's statements. Ms. Parshley only discussed the inventory issue with three people, Mr. Stanton, Ms. Burton (in general terms) and Mr. Harry because she "considered it a private matter."

RX 46 - Ms. Parshley's e-mail message to Mr. Stanton on August 30, 2001 and Mr Stanton's September 9, 2001 e-mail reply. Ms. Parshley queried Mr. Stanton about the FAA inspection of the airlines' warehouse. She needed clarification about the FAA's response that the failure to accomplish the last two steps of the receiving process might be inefficient but not illegal. Ms. Parshley stated, "I was not necessarily trying to show that the company was doing something illegal. I was showing them that the company was not following the process required in the manual." If the latter steps are not accomplished until five months after receipt, Ms. Parshley wondered how the company could say it was complying with the process. Further, how could they ensure in steps had actually been accomplished. In Ms. Parshley's view, it was not just enough to accomplish the steps. A person must also document the action and the inventory process provides that documentation. As a post script, Ms. Parshley asked:

By the way, did you and Doreen ever find parts on the shelf without the proper tags?
I believe you had told me that you did, but I don't recollect how frequently or how many. That would also indicate a lack of controls, I think!

In his response, Mr. Stanton indicated he was principally focused on repair and expendable parts because the rotatable parts were tracked by serial number and a tracking tag. The process works if the parts are accompanied by the paperwork but "a lot of parts are returned with no serviceable tag." The stock clerk uses the manufacturer's part number and then does the three steps. Mr. Stanton stated that on two or three instances, he found unserviceable parts on the shelf, but they were rotatable parts with tracking tags showing unserviceability and the computer indicated they were unserviceable. On other occasions, repairable and expendable parts were ordered by maintenance and then returned for credit. In those cases, Mr. Stanton didn't know whether to count the parts as inventory.

RX 47 - Ms. Parshley's October 28, 2001 proposed witness list for DOL.

RX 48 - Ms. Parshley's October 24, 2001 letter to DOL indicating surprise that she had been contacted by a recruiter about a job prospect

RX 49 - Ms. Parshley's December 11, 2001 letter to DOL rebutting America West's assertions. She notes that her position was not eliminated. Instead, her job was filled ten days after her departure. With one minor exception, the filled job was the same as her former position. Her termination was not based on performance since her most recent appraisal showed that she met expectations. She pointed out that her performance for several years with the company had been

at that same level. If performance were a problem, she would not have received such a rating or merit pay increases. Ms. Parshley had several conversations with Mr. Harry “regarding incorrectly received parts.” She was terminated before she could present a report to Quality Assurance. Ms. Parshley asserts that based on her past raised concerns about safety in the company, her report to Mr. Harry of the “discovery of a potentially serious issue regarding the airline’s mishandling of parts. . . was the last straw.” The company used the announced reduction in force to “rid the company of an employee they viewed as about to ‘blow the whistle.’” The company was on thin ice with the FAA and any violation of a serious nature could ground their planes. In that environment, Ms. Parshley represented a serious threat to the company’s continued operations.

RX 50 - December 11, 2001 thank you letter from Ms. Parshley to Ms. Goo.

RX 52 - Ms. Parshley’s January 25, 2002 objection to the DOL’s findings and request for a hearing. She observed that the company had initially denied know of her “communication of the inventory control issue.” Only after questioning of Mr. Harry, did the company admit knowledge of her protected activity. Ms. Parshley observed that when she discussed the “inventory control issue” with the FAA, they suggested that she file a discrimination complaint under AIR 21. “Based on the limited facts available then, it was clear to the FAA that the information I provided was potentially very serious and that my termination could have been retaliatory.”

RX 53 and RX 54 - Ms. Faulkner’s March 27 and March 29, 2002 submission of documents relating to Ms. Parshley’s unemployment claim and her re-employment efforts. The later document calculates Ms. Parshley’s damages to date as \$50,685 in lost wages and benefits, partially offset by unemployment benefits.

RX 55- Ms. Parshley’s responses to a second set of interrogatories estimating her damages at \$83,000.

RX 56 - Mr. John Chapman’s April 19, 2002 deposition. Mr. Chapman was hired at America West in June 1999 as a warranty administrator. In mid-2000, following the disbanding of the Warranties Department, Mr. Chapman moved under Ms. Parshley’s supervision. Based on his observations and in light of his experiences, Mr. Chapman characterized Ms. Parshley’s management style as “reactive.” On occasion, she appeared to make decisions based on personalities and not business reasons. She was very vocal about the other managers within the maintenance organization and expressed her opinions about how they managed their budgets. At the same time, she was very supportive of her staff and concerned about their well-being. Yet, while under stress, Ms. Parshley barked at Mr. Chapman in the middle of the office.

Mr. Chapman recognized RX 27 as his declaration. When Ms. Parshley indicated that no staff member could contact an upper level manager without her knowledge, Mr. Chapman became exasperated because in his warranty work he frequently contacted upper level managers. He felt her policy was disruptive since it interfered with the company’s business flow. In his opinion, his ability to work effectively with managers on warranty issues came to a grinding halt. Mr. Chapman also had to develop a tracking system to monitor the status of paperwork that he had to route through Ms. Parshley. Ms. Parshley seemed to become more controlling at the end of 2000 when

an audit didn't seem to go as planned. The atmosphere in her office became paranoid.

On other occasions, when she became angry with a manager, Ms. Parshley would tell her staff not to deal with the person. One specific example was the director of the power plant area, Mr. Terry Radke. She also mentioned Mr. Hansen, Mr. Seymour, Mr. Clemmer, Mr. Bonowski, and Mr. Martin. On one occasion when he informed Mr. Bonowski that he couldn't attend a meeting with him due to Ms. Parshley's instructions, Mr. Bonowski stated the restriction was ridiculous.

Eventually, toward the end of 2000 and the beginning of 2001, due to his frustration, Mr. Chapman spoke to Mr. Harry a couple of times about his concerns about not being able to do his job. He suggested Ms. Parshley needed to be coached on not micro-managing her staff.

RX 57 - Ms. Parshley's deposition taken March 21, 2002 and April 11, 2002. Ms. Parshley has an undergraduate degree in economics, an MBA, and a masters degree in finance. She's been a certified management accountant since 1997. She also possesses a commercial pilot's license and is a certified flight instructor. All her previous employment involved finance or accounting.

Ms. Parshley believes she was terminated by America West for whistle blowing. When asked to name her "whistle blowing-related activities"¹¹ which she believed played some role in her termination, Ms. Parshley identified:

a. After an analysis in the fall of 1999, Ms. Parshley communicated to her direct manager, Mr. Shannon Hyland, that the maintenance and engineering division failed to record an additional \$5 million in expenses. The responsible managers believed that she was wrong; however, the expenditures were ultimately recorded as expenses.

b. In the early part of 2000, Ms. Parshley monitored project spending to ensure they were not overspent. In particular, projects over \$1 million required the approval of the Board of Directors. Ms. Parshley discovered that a project under Mr. Gary Martin's supervision had been over spent by \$2 million and the funds had been committed in violation of company policy concerning Board of Directors supervision. In her conversation with Mr. Martin about the overspending, he seemed upset that she had brought the issue out. But, Ms. Parshley had the responsibility to monitor spending and Mr. Martin was responsible for making sure the projects were not overspent. Eventually, the Board of Directors approved the expenditure. Prior to the incident she had amicable contacts with Mr. Martin but after her report their relationship became "somewhat adversarial."

c. Around August of 2000, Ms. Parshley identified a violation of the sexual harassment policy. She had requested some information from the repair order administration department and Mr. Mike Hanson gave her a computer disk in response. When she opened up the disk, it contained

¹¹Ms. Parshley was also vocal about "known" safety problems at America West and expressed her frustration. But, since the events were known, she doesn't consider her comments whistle blowing.

two files. One file contained the requested financial data. However, the other file contained several images of naked men. Ms. Parshley found the images very offensive and contacted Ms. Prelog. Both Ms. Prelog and Mr. Hyland reviewed the images and stated an investigation was warranted. The investigation revealed that Mr. Hansen was not aware of the offensive material. Instead, one of his assistants had downloaded the images. Ms. Parshley was aware that another of Mr. Hansen's assistants, who was eventually terminated, had also previously downloaded pornography, so she was surprised by this second incident. Further, Ms. Parshley was surprised that this second assistant was only given a warning and Mr. Hansen, the supervisor of both people who downloaded inappropriate images, was promoted. After her report and the subsequent investigation, even Mr. Hansen's supervisor, Mr. Seymour "became somewhat hostile." Finally, Ms. Parshley also had expressed to Ms. Prelog her frustration with the insufficient actions taken by the company in response to sexual harassment complaint filed by Ms. Parshley's sister, who worked in America West operations.

d. Around the middle of March 2001, Mr. Gene Stanton, an inventory control specialist, told her a third shift a material handling employee had taken a list of approximately 800 parts and keyed into the computer tracking system "all the entries that would complete the receiving and binning entry for those parts." The parts had been initially brought into the warehouse in November of 2000 and placed on the shelves but "it was not clear that the inspection process had taken place and the record keeping, which is suppose to be done in conjunction with the inspection process, that record keeping had never taken place." Mr. Stanton believed the material handling supervisor had violated policy because he just took the list of the 800 parts and made the computer entries without determining whether the parts had been inspected and possessed serviceable tags. That practice exposed the company because there wasn't anyway to confirm that appropriate material handling personnel had inspected the parts. Mr. Stanton was sure the person making the computer entry hadn't confirmed that the receiving inspection had been accomplished." The material handler's computer entry was a representation that all of a part's processing steps, including inspection, had been accomplished.

Part of such inspection might include the presence of a serviceable tag that demonstrates the part was overhauled by an appropriate maintenance facility. [The next series of questions and answers are best set out verbatim]¹²

Q. [If the material handling specialist] input a part into this computer, finished the transaction in the computer –

A. Yes

Q. – and that part was sitting on the shelf and didn't have a tag on it, would that part be able to be used in an aircraft?

A. If it didn't have the tag on it?

¹²Deposition transcript, page 73.

Q. Didn't have the tag on it?

A. But it was in the system as having a tag, could be used? Is that the question?

Q. Correct.¹³

A. I can't answer that.

Q. You don't know? Is that why you can't answer it?

A. Right.

At the same time, Ms. Parshley believed a safety issue was involved because "the receiving inspection possibly had not been conducted appropriately and that going forward I thought it was procedurally, if they were going to continue to violate that policy, it was going to be an ongoing issue."

In response to Mr. Stanton's report, Ms. Parshley went to Mr. Harry and informed him "that what I was going to do was I was going to have reports run out of the SCEPTRE system under NOMAD, report writing system, and I was going to get all the details of the 800 transactions and demonstrate what had happened." She would then take that information to the Director of Quality, Ms. Grey. Previously, Ms. Grey had expressed her concern that only appropriate personnel should be permitted to conduct the inspection process. Ms. Parshley distinctly remembers her conversation with Mr. Harry because he commented, while wincing, that he didn't like dealing with Ms. Grey. Ms. Parshley wanted to get all the documentation before seeing Ms. Grey. Mr. Harry "didn't really express much emotion at all. He just kind of nodded. Other than the comment about Ms. Grey, he didn't say a whole lot about it."

She then told Mr. Stanton about her discussion with Mr. Harry and had Mr. Stanton meet with a data analyst who would retrieve the data. Although Mr. Stanton had a listing of about 800 part numbers, (which apparently was subsequently deleted by the company), Ms. Parshley did not want him to share that information with the analyst. Instead, the analyst's task involved retrieving computer system data concerning the receiving and binning of parts. Ms. Parshley wanted to see if 800 parts transactions had been accomplished at one time. She believed it would be inappropriate for 800 parts to have been received in November 2000 and placed on the shelves and then "sitting in a queue and not inspected but being on the shelf and then all transacted in one evening in March." But the analyst was out quite frequently and Ms. Parshley was assigned other tasks, including a warranties audit, so she was unable to work on the documentation. When Ms. Parshley indicated to Mr. Harry that she need to get the parts documentation, he didn't say much other than to instruct Ms. Parshley to continue with the closing audit. She never reported the problem to Ms. Grey because she was unable to obtain the requisite data. When the analyst couldn't complete the report,

¹³Ms. Faulkner entered an objection to the question as calling for speculation. However, Ms. Parshley's subsequent answers to this inquiry did not amount to speculation.

Ms. Parshley didn't assign someone else the task because no one else was available. And, even though she believed it was a safety issue, she didn't approach Ms. Grey because she didn't have the documentation and the parts were already on the shelf and that couldn't be undone.

e. In her discussion with Mr. Harry about the 800 parts, Ms. Parshley also passed onto to him Mr. Stanton's report that supervisor passwords in the material handling department were not being kept confidential. As a result, employees could input parts entries into the computer system without proper training in inspection and receiving. She also expressed her intention to investigate that problem.

f. In late 1999, Ms. Parshley wrote a memo about her financial visit to a contractor's engine overhaul facility which included her concern that the "facility was very lax in their safety."

g. In March 2001, after Ms. Parshley and Mr. Harry went to a hanger to observe an aircraft with a collapsed nose gear, she expressed her concern to him that she understood there had been people all around the aircraft when the gear cycling test had been accomplished. Not only was the accident expensive, she was surprised no one was hurt. Mr. Harry just nodded.

h. At a meeting in the early part of 2001, Ms. Parshley learned that a passenger had a heart attack on a company aircraft that did not have a defibrillator on board due to an out-of-stock bracket. No one at the meeting appeared willing to accept responsibility for the incident. A month later, when another passenger survived a heart attack because of an on-board defibrillator, America West issued a press release about the fortunate incident. In light of the press statement, Ms. Parshley observed to Mr. Harry that information was misleading because it did not mention the first heart attack incident, which had been fatal.

i. A day or two before her termination, at another meeting, Ms. Parshley learned that an aircraft engine had ingested a safety pin from the pocket of a mechanic standing near it. Ms. Parshley later expressed her opinion to Mr. Harry that the participants seemed more concerned about the aircraft than the potential danger to the mechanic.

No one at America West ever told her that she was terminated due to whistle blowing. When Mr. Harry told her that her position was being eliminated, he didn't give her a specific reason. Instead, he told her that she knew why; it involved performance issues. At the termination meeting, whenever Mr. Harry started to discuss the performance issues, Ms. Prelog jumped in and started the action was part of a workforce reduction.

When Mr. Harry discussed her performance in March 2001, he expressed his appreciation for her help in his transition into the organization. The report indicated she met expectations and had developed a great staff. Mr. Harry did observe that their jobs, as controllers, required them to get along with challenging individuals. He stressed being objective and trying to maintain good working relationships with everyone in the organization. Mr. Harry encouraged her to work on that challenge in order to advance to the next level of responsibility. Ms. Parshley expressed an intention to work on the area; but, she would not permit people to do the wrong thing. For example, Mr.

Martin was upset with her overspending report.

Mr. Harry and Ms. Parshley also discussed her 360 feedback survey. She noted that some individuals, like Mr. Seymour and Mr. Martin, indicated she was difficult to get along with. However, other survey comments indicated that she was very approachable. Mr. Harry stressed developing working relationships.

Following the company's announcement about a work force reduction, Ms. Parshley and Mr. Harry discussed leaving two positions in her organization unfilled. Later, one of the positions was filled by a person Ms. Parshley didn't think was ready for the job. Additionally, Ms. Parshley's position was also filled by Ms. Karen Levy, an external candidate. Since her departure, Ms. Parshley has kept in touch with some of her former employees.

Around Memorial Day after her termination, Ms. Parshley reported the parts handling issue to an FAA representative, who she knew. While she may not have mentioned 800 parts, Ms. Parshley did report that the parts arrived in November and then in March all the transactions were entered into the computer system without following the receiving process. Ms. Parshley expressed her belief that her termination was related to the parts event. She didn't mention the defibrillator issue and she doesn't believe she discussed the misuse of passwords. Her concern was turned over to the local FAA office with oversight responsibility for America West. Eventually, she discussed the issue with an FAA maintenance inspector. About that time, she was asked if she was aware of AIR 21 and one inspector suggested she might want to file a complaint. When she made a follow-up call in August, the inspector indicated that without documentation, they were challenged. So, she asked Mr. Stanton, who by then had changed jobs, to try to obtain the spreadsheet containing the parts' numbers. However, when he tried to find the file on the computer that he had used, all of the files had been erased. Everything was gone. Finally, in August, the FAA inspectors informed her that they weren't able to look at the transactions she named. The material handlers confirmed they were following the company's receiving policies.

Ms. Parshley did not discuss her concern about the parts processing with the parts warehouse supervisor because she believed he was aware of the material handler's entry practice.

Ms. Parshley started at America West in August 1997 as a senior analyst. In April 1998, she was promoted to a manager of financial planning position. Over the course of the next few years, several additional responsibilities, such as inventory control, were added to her job. Her salary was likewise adjusted.

Following her termination, Ms. Parshley did not apply for any other jobs at America West because none were available. Since May 2001, she has been a part-time instructor of computer on-line courses for Embry-Riddle Aeronautical University. She also taught one class in a classroom. At the time of her deposition, she anticipated teaching advanced managerial finance for the Keller Graduate School of Management. She has also done some free lance flight instruction. Ms. Parshley has applied for several on-line teaching jobs with numerous universities. She has been checking the newspaper employment ads, but job openings were reduced significantly following September 11,

2001. Although she is a certified management accountant, accounting firms typically seek CPAs. So she hasn't applied for accounting positions. Further, in light of the economy, she decided her best opportunities existed in teaching and aviation. Ms. Parshley applied for, and received, unemployment benefits.

Concerning her damages, Ms. Parshley calculated the contributions to her 401 K plan, and projected the potential earnings out 25 years, at 8 % interest, and determined the present value is \$53,884. She also believes America West's action has damaged her reputation because the company asserts her selection for termination was based on performance and her position really wasn't eliminated but filled instead.

Assorted attachments to the deposition include a) Ms. Faulkner's May 15, 2001 demand letter to America West, on behalf of Ms. Parshley, setting out her case for damages in the total amount of \$150,000; b) numerous job application e-mails; c) newspaper employment ads; d) a work search plan; e) Ms. Parshley's April 2002 answers to interrogatories. In the answers, Ms. Parshley indicates she is seeking recovery of lost wages and benefits and compensation for damage to her reputation. Her damages are estimated to be \$83,421, representing one year's salary plus benefits, and \$53,884 for loss of 401 K.

RX 58 - April 12, 2002 pre-hearing statement by Ms. Faulkner. Ms. Faulkner chronicles Ms. Parshley's employment history and adds several other incidents and events not previously covered in Ms. Parshley's deposition. In January 2000, Ms. Parshley discovered, and reported to Mr. Hyland, that the company controller had revised her recorded maintenance expense downward by \$2 million and reduced another maintenance expense by \$3 million. Ms. Parshley objected that these changes were not legitimate. In the fall of 2000, Ms. Parshley discovered, and objected to, the disclosure of confidential performance information by a human resource specialist. In March 2001, Ms. Parshley shared her concern with Mr. Harry that the company's finance organization was being too creative with financials and stated that as a certified accountant she would report both favorable and unfavorable information. In the spring of 2001, Ms. Parshley became aware that a company aircraft experienced airframe vibrations. The company continued to fly the aircraft until scheduled heavy maintenance when a serious defect in the tail section was discovered. In March 2001, Mr. Harry became aware that Ms. Parshley had at least one acquaintance with an FAA official.

Concerning the parts processing incident, the pre-hearing statement explained that the correct processing procedure involved three steps of receiving, inspection, and binning. Each step needed to be accomplished the appropriate warehouse personnel. However, in November 2000, several hundred parts were received into the warehouse without the requisite inspection and binning steps. When the omission became apparent, a warehouse person simply put the last two steps into the computer system for the parts as if they had been properly inspected and binned.

After her termination, Ms. Parshley contacted the FAA because she was concerned that with her departure no action would be taken to correct a potentially unsafe condition with the improperly processed parts. At the same time, the statement adds, "at the time of her reporting of the material handling issue, neither Ms. Parshley nor Mr. Harry knew how serious the outcome would be. . . and

that had she been able to complete her investigation, she would not have allowed an unsafe condition to go unresolved. . .”

Ms. Parshley believes she became a liability to the company “because of her knowledge of the operation, her contact with high-ranking FAA management, and her strong convictions and outspokenness.”

Sworn Testimony

Mr. Craig C. Harry (TR, pages 249 to 406)

Mr. Harry is the Division Controller and Director of Finance for the Technical Operations Division of America West. He began working for America West in 1989 and was in his present position by August 2000. He is in charge of the finance function of the division that maintains and supplies the company’s aircraft. He supervised Ms. Parshley who was the Manager of the Operating Group within the Financial Group. His organization assists the other departments within the division with financial information support and supports the division chief, the Senior Vice President, with the management of expenses associated with the maintenance division.

In light of his organization’s responsibilities and Ms. Parshley’s position, she had to extensively interact with the directors of other departments within the division. Prior to working with her, Mr. Harry had heard from Mr. Shannon Hyland some concerns about how she presented information at senior manager meetings.

In his assessment, Ms. Parshley had “good financial skills” and understood accounting and finance. However, over time, he became concerned about her ability to manage her staff and work with other department managers. In September or October 2000, Mr. Radke, Director of Power Plant Engineering, expressed his frustration with Ms. Parshley concerning the inability of his engineers to obtain supportive financial information from her. He passed on multiple complaints, about once a month.

In the fall of 2000, Mr. Martin, Director of Engineering, also said Ms. Parshley was interfering with his group’s work. In particular, due to budget issues, Ms. Parshley had deleted work orders without telling the management. He approached Mr. Harry a couple of times about his difficulties about working with her group.

In March 2001, Mr. Seymour, a director of materials and planning, expressed general frustration with Ms. Parshley because she was difficult to work with. His group was struggling to work with her organization.

One member of Ms. Parshley’s staff had talked to him, after Ms. Parshley had given her a formal appraisal. The individual was shocked by the appraisal because based on Ms. Parshley’s persistent feedback she thought she was going to get fired. Instead, she received an exceptional rating. Another staff member who had been counseled for performance problems expressed to Mr.

Harry her concern about Ms. Parshley's management of her group and its lack of direction. After that conversation, Mr. Harry started having a concern about whether the counseling action against that employee had been appropriate. Further, other individuals who were considering moving to the division expressed hesitation about working with Ms. Parshley because they had heard she was difficult.

In November 2000, Mr. Harry completed a feed back survey about Ms. Parshley in conjunction with leadership training she was receiving (RX 9).¹⁴ In the report, he expressed some concerns by indicating she needed to develop patience in dealing with difficult situations. He also recommended that she continue to develop a positive relationship with other business managers. Later, Mr. Harry discussed his comments with Ms. Parshley. None of his comments on the form indicated she was below average in any area.

In late December 2000, or possibly early January 2001, Ms. Parshley received her 360 evaluation (RX 10). They discussed the report and Ms. Parshley expressed concern that some of the scores were low. Mr. Harry was not so interested in the percentages but was concerned about the trends which suggested problems with interpersonal relationships and communication. Based on her responses to the survey, Mr. Harry believed Ms. Parshley understood her problem.

Mr. Harry met with Ms. Parshley again in January 2001 to discuss her performance. At that time, Mr. Harry was working on a draft of her evaluation that was due in March 2001 (RX 12). He prepared the draft early in order to make a recommendation on a merit increase. As he worked on the appraisal, Mr. Harry realized he needed to discuss with Ms. Parshley some important areas that she needed to address. In particular, he stressed with her the need to work on interpersonal relationships. Ms. Parshley seemed receptive and didn't disagree.

From Mr. Harry's perspective, Ms. Parshley's performance in the relationship area did not improve materially. He continued to receive complaints from various managers, such as Mr. Seymour, Mr. Martin, and Mr. Radke. He also heard from at least one member of Ms. Parshley's staff about her management abilities. In response to the managers' complaints, Mr. Harry interjected himself as a point of contact so the managers wouldn't completely avoid the financial group. By February and March 2001, Mr. Harry had concluded that those "relationships" with Ms. Parshley were "not functioning." In hindsight, Mr. Harry agreed that he should have been more direct in his approach with Ms. Parshley's problems.

Concerning the engineering work orders being pulled, Mr. Harry thought the incidents reflected poor communications by Ms. Parshley. To provide a more effective approach, Mr. Harry tightened the controls on the approval of the engineering work orders instead of pulling the work orders off. Mr. Harry didn't research whether Ms. Parshley was following the procedures set out by her former supervisor.

¹⁴Apparently, only page two of the feedback form was available. Mr. Harry did not recall what was on the first page of the form (TR, page 329).

When he presented the performance report in March 2001 (RX 13), Mr. Harry again discussed the improvements areas highlighted in the report, which had also been previously covered in their January 2001 conversation. Mr. Harry found Ms. Parshley's technical skills were very good. She was a capable manager but still struggled in "relationships with division management." Mr. Harry perceived that due to the friction between Ms. Parshley and some managers, she was slow to respond to their questions. Since Ms. Parshley had recently taken a conflict management course, Mr. Harry added on the report that she had initiated effort to improve her contacts with other managers. He did rate her as meeting expectations overall and recommended a 3.5 % salary increase, which was slightly below the company average for that rating. Mr. Harry also determined that she exceeded customer expectations. Ms. Parshley also handled very well the challenging work within her group, such as the budget. Mr. Harry further explained that while some managers were complaining about her poor ability to track items, Ms. Parshley also handled other aspects of a complicated process very well and her appraisal reflects that good work. In fact, she had the best experience and knowledge in the maintenance finance group. Ms. Parshley was a capable manager and had "good potential." Ms. Parshley seemed receptive again to the evaluation.

Prior to completing the performance report, Mr. Harry asked Ms. Parshley for her input. She prepared a response which included a discussion of her last three 360 degree evaluations (RX 11). A trend appeared showing that Ms. Parshley had dropped below the company's 25th percentile in some areas such as customer focus and corroborated his assessment of her relationships with other managers. Mr. Harry also considered her 1999 review (RX 6) in assessing Ms. Parshley's effectiveness. The results in that rating showed "above average" including interaction with other managers.

After Ms. Parshley received her performance report in mid March and before her separation at the beginning of May, the environment at the company became more challenging; the operating environment became more critical in those 30 days. Mr. Harry decided in late April that Ms. Parshley would be separated. During this time, Mr. Harry admitted that Ms. Parshley's performance itself did not deteriorate. However, he started to reassess his documented opinion that Ms. Parshley was a good leader of her group after talking to an employee who complained about Ms. Parshley's leadership style.

At the end of March 2001, Mr. Harry didn't have an intention to fire Ms. Parshley but he should have started a corrective action plan. Then, in April he felt challenged by the restructuring program to look at his group more critically. He concluded a change was necessary in regards to Ms. Parshley. At the same time, Mr. Harry agreed that the company typically does not terminate an employee who received an appraisal indicating he or she meets expectations.

In mid-April of 2001, America West announced a reduction of employee payroll and restructuring in response to a weakening economy. The goal was a 10% reduction in head count and an elimination of 5% of the work force. So, they were looking at payroll reduction, employee reduction, and restructuring. Mr. Harry felt challenged to improve the effectiveness of the financial group and he identified Ms. Parshley as a reason for the group's under-performance. So to restructure his organization to become more effective, he decided to make a change in her position.

He also eliminated an inventory control specialist position. Mr. Harry passed his suggestion to a company vice president. A few days later, the vice president agreed on Ms. Parshley's position but restored the specialist position through the elimination of other positions in his organization. That senior manager did not ask to see Ms. Parshley's file. At that time, Mr. Harry had 16 people in his group, including one filled manager position that was occupied by Ms. Parshley. During this process, he also discussed the restructuring in general with Ms. Parshley.

On May 2, 2001, Mr. Harry, with Ms. Prelog present, informed Ms. Parshley that the reductions and restructuring were affecting her and she was being terminated. The meeting lasted several minutes. Mr. Harry doesn't recall whether he said the process was affecting her position. Ms. Parshley was upset and asked about the selection criteria. He replied there were several criteria but was not specific. Mr. Harry understood that under the company program, certain people could be eliminated without eliminating the position.

Mr. Harry acknowledged that with the retention of the inventory specialist position and the filling of Ms. Parshley's position with another person that he met "very close to zero" of the 10% payroll reduction goal. There was no significant payroll benefits to her departure. At the same time, the senior managers above him had latitude to determine which areas were more suitable than others for reductions. Mr. Harry's recommendation had been to change the person in Ms. Parshley's position and not to eliminate the position in order to make "the business more functional." So her termination did not fall under the category of reduction in force. Instead, her separation was part of restructuring to help improve America West Airline's business performance. In other circumstances, it might have made business sense to keep Ms. Parshley in light of her technical skills, but in Mr. Harry's opinion those circumstances did not exist. Although Ms. Parshley's performance was adversely affecting his group's business performance, Mr. Harry did not let her go before the reorganization because "the environment became more critical in April."

According to Mr. Harry, Ms. Parshley did not make any safety complaints to him. Mr. Harry's decision to release Ms. Parshley had nothing to do with any safety complaints she may or may not have made to him or anyone else at America West. She did not ever tell him that she intended to report a safety issue to the FAA. Mr. Harry vaguely recalls that Ms. Parshley in early 2001 talked to him about "an error in a process and parts coming into the warehouse." She told him of her intention to run some reports to document the parts being improperly received. He did not perceive that complaint as a safety issue. Instead, it was an accounting problem. Ms. Parshley did not say that she was going to talk to Ms. Gray about the problem. Mr. Harry does not recall any other conversations about making a safety issue a priority. If he had become aware of a safety issue, Mr. Harry would have passed the information to the Quality Assurance Group of the company. Mr. Harry knew nothing about parts being on the shelves without serviceable tags.

The America West Mentoring Program is, or was, a program designed to expose young managers to the senior managers. A senior executive would act as a mentor. Mr. Harry understands that Ms. Parshley had been in that program.

Although Mr. Harry believed a reorganization and restructuring were goals in the reduction

in force, the announcement by the company's chairman did not include those terms. His understanding of the process came from a meeting around April 18th. Following this meeting, Mr. Harry wrote a note (CX 18) to himself querying "how do we get rid of a person without eliminating the position?"

After Ms. Parshley left, another person took over her office a few weeks later and performed some of her tasks. That person has a similar role as Ms. Parshley had. Some of Ms. Parshley's staff were surprised by her departure. Mr. Harry told Ms. Parshley's staff that her departure was not a reflection on her performance. Mr. Harry also announced that the other individual, an outside hire, would be taking over Ms. Parshley's responsibilities. Despite the freeze on hiring, Mr. Harry had approval to bring that individual in. Mr. Harry acknowledged the company had already approved filling Ms. Parshley's position before she was fired. In fact, after he interviewed this individual for another job, Mr. Harry had her in his mind as a candidate before he let Ms. Parshley go.

One of the managers, Mr. Seymour, who complained about Ms. Parshley also had an employee working for him that was the subject of a sexual harassment complaint by Ms. Parshley. However, Mr. Harry doesn't recall having a conversation with that manager about the incident.

Mr. Harry is aware of the company's progressive discipline policy (CX 21) and has been in an environment where corrective action reports have been prepared. Ms. Parshley's employee who had a performance problem received such a CAD. Mr. Harry did not utilize the same process with Ms. Parshley since he had already discussed her performance issues in January. He mentioned it again with the March evaluation report and would have started a corrective action as the next step but the restructuring arrived in mid-April and he decided to take more aggressive action. Because the business environment changed Mr. Harry went from an informal approach to Ms. Parshley's performance problem directly to the ultimate sanction of termination.

Ms. Caroline Prelog (TR, pages 410 to 456)

Having joined America West in June 1998, Ms. Prelog was the Manager, Human Resources Process and Support in April 2001. As her first job in that role, Ms. Prelog was responsible for the restructuring. She coordinated all the paperwork and payroll aspects of the restructuring. As Ms. Prelog understands the restructuring program, America West was attempting to reduce costs as well as improve productivity and performance. To accomplish these goals, managers were to identify positions, people, or functions that provided cost reductions and improve productivity. Managers were to consider performance, job skill experience, productivity, seniority, and other factors. They did not have to consider the progressive counseling policy. As a result, the restructuring was not just about eliminating employees. About 120 people, mostly in managerial positions, were affected.

The names of the identified employees were funneled to her but she did not review the appropriateness of the selections. She became aware of the restructuring in mid-April and most of the separations took place in early May. Follow-up issues continued into July 2001. Most of the terminated employees were offered varying severance packages. Ms. Prelog recognized CX 7 as

the cover sheet to a severance package which states that one of the goal of restructuring was to maximize staffing dollars. The letter additionally states that some positions are being eliminated and other positions might be filled in the future. That provision was included to inform the separated employees that some of the vacated positions were going to be filled.

Ms. Prelog was present during the May 2, 2001 meeting between Mr. Harry and Ms. Parshley to help facilitate the meeting. The severance document was presented to Ms. Parshley then. When told of the decision, Ms. Parshley asked why she hadn't been told before. Mr. Harry responded that he couldn't. In response to Ms. Parshley's inquiry about her selection, Mr. Harry stated she knew why. At that point, Ms. Prelog interjected and indicated the decision had been made and was final. Then, she covered the separation packet of information, including the severance agreement. The company was also offering out-placement services. The meeting lasted 10 to 15 minutes. At the end, Ms. Parshley asked if it had anything to do with her sexual harassment complaint. Ms. Prelog replied that it was not related and pointed out that Mr. Harry wasn't aware of the complaint. Ms. Prelog did not indicated that Ms. Parshley's position was being eliminated or state that the termination was a reduction in force. Ms. Parshley did not ask any questions at the meeting, or later, about the severance package.

Ms. Prelog also pointed out that even though a separated person's position may have been backfilled, that person still counted as part of the original separation goal. The approval process for backfilling position was separate from the restructuring program. Ms. Prelog was not aware that a decision had been made to fill Ms. Parshley's position right after she left.

Mr. Harry informed Ms. Prelog that he was separating Ms. Parshley due to performance problems. He had received complaints about her communications and interaction with other managers.

Although America West has a progressive counseling policy, it applies to front line employees and not managers. Instead, other steps, such as a development plan, are taken rather than the formal steps of progressive counseling.

Ms. Prelog prepared the company's response to the Department of Labor which indicated the basis for Ms. Parshley's separation included unsatisfactory leadership and substandard working relationships with customer groups as reflected in her 1999 and 2000 appraisals. However, Ms. Prelog made a mistake in that statement because the 1999 appraisal she reviewed was really for 1998. In subsequent correspondence with the Department of Labor, Ms. Prelog did not correct the mistake and never found the 1999 appraisal.

Based on the representations from Mr. Harry, Ms. Prelog also indicated to the Department of Labor that the person who replaced Ms. Parshley assumed a substantially different roles. She provided to the Department of Labor the documents she felt were relevant.

Mr. David Seymour (TR, pages 458 to 500)

Having been with America West for three years, Mr. Seymour is the Senior Director of Materials and Planning. In that capacity he manages all the material requirements for the maintenance and engineering section of the airline. His department interacts with the finance group with an annual budget at times in excess of \$50 million in capital expenses and \$30 million in expenses. His managers oversee their particular cost centers and Mr. Seymour gets a monthly overview of their situation. He does deal with finance concerning warranty issues.

He interacted with Ms. Parshley in the budget process. Initially, he found her resistant to new ideas or different ways of doing things. His organization was trying to collect more data and find different ways to build a forecast. Over a period of time the relationship improved and became cooperative around the summer of 2000. Yet, in the latter part of 2000, the situation changed again and she became defensive and less cooperative. Her employees asked him not to contact in the office because of Ms. Parshley's reaction. It became a "very unconstructive environment to work in" because he would try to avoid interacting with her.

A couple of times, Mr. Seymour passed on his experiences and observations about Ms. Parshley to Mr. Harry. He found the inability to go directly to Ms. Parshley's staff members dysfunctional and told Mr. Harry that he would bring his financial issues directly to Mr. Harry.

Mr. Seymour recognized RX 24 as his statement to the company about his interactions with Ms. Parshley. One of the identified main issues was her unresponsiveness to his inquiries about activities related to his department. For example, she resisted his suggestion to establish additional cost centers. She didn't provide the expected customer service. So, he tried to work around her. Mr. Seymour did not discuss these issues with Ms. Parshley. Rather, he went to her supervisor, Mr. Harry, because it's up to the manager of the individual to take the appropriate action. Mr. Seymour did not make any complaints about Ms. Parshley to her prior supervisors.

Since Ms. Parshley left, Mr. Seymour finds the environment very cooperative and refreshing. There is a very good working relationship with people in his group.

As the senior manager for materials, Mr. Seymour is familiar with the receipt of parts into the warehouse. Individuals receiving material are trained and go through a period of 100% oversight work. Most of the individuals are stock clerks. Ms. Grey is the Director of Quality Assurance. That organization audits the company's work to ensure compliance with company procedures and FAA regulations. The FAA also conducts periodic audits of the warehouse.

Mr. Harry's supervisor, Mr. John Wilson, asked Mr. Seymour about the recommendation to terminate Ms. Parshley. He responded that based on his observation of her performance, he recommend termination.

In the middle of 2000, Ms. Parshley submitted a sexual harassment complaint against an employee in Mr. Seymour's department. Mr. Seymour is aware that corrective action was taken.

Although Mr. Seymour has not had to use progressive counseling, he agreed that if the company manual reference its applicability to management, than the program applies to managers as well as front line employees.

Mr. Gary F. Martin (TR, pages 500 to 26)

Mr. Martin is the Senior Director of Engineering and Maintenance for America West. His organization is responsible for originating most of the work accomplished on the company's aircraft. His group interacts with the finance group on the budget for their programs, which exceeded \$205 million last year. He also periodically interacts with the finance group.

He worked with Ms. Parshley and observed her work performance in his three years at the airline. In the beginning, he was pleased with her help in getting their budgeting process in order. At the same time, when charged by regulations to modify aircraft flight recorders, his group focused on engineering solutions and did not concentrate on the finance aspect of the problem.

Sometime in the spring or summer of 2000, his work relationship with Ms. Parshley changed. "Rather than helping us as a business partner, she began to inhibit some of the work that we were trying to accomplish." For some reason, she decided to review every engineering work order and told his people not to schedule some of the work. His managers and directors reported their frustration with the finance department. Friction existed. In particular, Mr. Martin observed that as the company was struggling for survival in 2000 and his organization was focusing on aircraft reliability, Ms. Parshley would arbitrarily pull scheduled work causing a delay in an aircraft's maintenance. He took her interference with his functions relating to aircraft reliability personally. Instead of helping the company improve its operational image, Ms. Parshley impeded it. At the same time, Mr. Martin acknowledged that some of the work she stopped had exceeded the approved capital threshold. He also vaguely remembers correspondence from the finance group about pulling unapproved work.

When Mr. Harry arrived, Mr. Martin quickly developed a business partner relationship with him.

He started using Mr. Harry as his finance contact because Mr. Harry understood his mission and was there to support him. If one of his managers had a problem with Ms. Parshley, Mr. Martin would have him go to Mr. Harry directly.

Although Ms. Parshley reported overspending on the flight data recorder modification beyond the approved capital threshold, Mr. Martin focused on the engineering problems and was not upset with Ms. Parshley.

Mr. Martin recognized RX 26 as his summary that he prepared for Ms. Prelog.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Probative Weight Findings

Although the parties may harbor critical opinions about the veracity of some of the witnesses in this case, I generally found most of the individuals who testified, in particular Mr. Stanton, to be credible witnesses who provided probative testimony. Within brackets ([[-]]) in the following specific findings, I will discuss in more detail my assessment of such testimony when a direct conflict exists relating to a specific finding.

Specific Findings

Based on the documents in the record and the probative sworn testimony, I make the following findings of fact.

June 9, 1997 - Ms. Parshley submits a job application to America West accompanied by a resume showing financial analyst and senior accounting experience and the following education degrees: MS (Finance), MBA, and BS (Economics and Business Administration). (RX 4, RX 57, and Ms. Parshley's testimony)

July 24, 1997 - America West offers Ms. Parshley the position of Senior Analyst at \$47,000 annual salary. (CX 19, RX 4)

July 27, 1997 - Ms Parshley accepts the job offer. (CX 19, RX 4)

August 11, 1997 - Ms. Parshley becomes an America West employee. (CX 20)

January 1998 - America West publishes a Progressive Counseling Policy for the "effective and equitable" corrective action among employees, including managers, for unsatisfactory performance. The first step involved counseling by a supervisor, which the supervisor annotates in the employee's file. If performance does not improve, the supervisor next conducts a formal performance discussion with the employee warning the individual that continued unsatisfactory performance might lead to termination. This meeting is known as a CAD. (CX 21 and Ms. Parshley's testimony)

April 1998 - Ms. Parshley is promoted to the position of Financial Planning and Analysis Manager for Maintenance Operations and receives a subsequent salary increase. Her duties do not include the receipt of aircraft parts but she does eventually become responsible for inventory control . (CX 6, CX 33, RX 21, RX 33, RX 57, and Ms. Parshley's testimony)

January 1999 - In her 360 degree feedback survey, Ms. Parshley receives her highest score, 4.24, on a scale of 1 to 5, for analytical thinking. Her lowest score of 3.77 is in the area of developing others. For communications and customer focus, her customers give her 4.02 and 3.96. (RX 5)

March 24, 1999 - Mr. Jarvie, Ms. Parshley's supervisor indicates on her 1998 Performance Appraisal that she meets expectations. After complimenting her on timely responses to management requests and noting her technical skills, Mr. Jarvie identifies interdepartmental relationships as an improvement area. (RX 7)

November 1999 - Ms. Parshley achieves an overall score of 3.9 on a 360 degree feedback survey. With a top score of 4.3 for analytical thinking, Ms. Parshley stands with the top upper 50% of the company managers. Her low score of 3.7 for customer focus places her with the bottom 25% of the company's managers. While recognizing analytical skills, integrity and judgment as strengths, her "direct reports" stress customer focus as a development area. (CX 5, RX 6)

March 19, 2000 - Mr. Hyland, Ms. Parshley's supervisor, formally rates her performance for 1999. Finding that she meets expectations, Mr. Hyland highlights Ms. Parshley's key role as part of the Maintenance and Engineering team. At the same time, he notes her need to develop a customer service orientation in conflicting situations. Mr. Hyland also stresses that both communication and a positive approach would contribute towards her advancement in the company. (CX 2)

Spring of 2000 - Ms. Parshley reports that a flight data project under Mr. Gary Martin's supervision has been overspent by \$2 million without the requisite Board of Directors' approval. Subsequently, her relationship with Mr. Martin becomes adversarial. (RX 57 and Ms. Parshley's testimony)

June 15 and July 3, 2000 - Mr. Hyland recommends and Ms. Parshley receives a merit salary increase. (CX 33)

Sometime prior to Mr. Hyland's departure as Ms. Parshley's supervisor - Based on Mr. Hyland's instructions, Ms. Parshley pulls unbudgeted engineering work orders. Although she informs the affected project managers and engineers, in the absence of any specific request by Mr. Martin, the engineers' senior director, she does not inform him of her actions. (Ms. Parshley's testimony and Mr. Martin's testimony)

Ms. Parshley report a violation of the sexual harassment policy when she receives a computer disk with inappropriate images in one file. Mr. Seymour, the Senior Director for Materials, is aware of the complaint and the corresponding disciplinary response involving one of his employees. (RX 57 and Mr. Seymour's testimony)

August 2000 - Mr. Craig Harry replaces Mr. Hyland as Ms. Parshley's supervisor when Mr. Harry becomes the new Director of Finance for the Maintenance and Engineering Department. His direct supervisor is the Vice President for Operations Planning. Ms. Parshley works as the Manager of the Operating Group. The purpose of Mr. Harry's organization is to provide the division with financial information support and assist in the management of expenses. Due to his group's mission and Ms. Parshley's position, she has extensive interaction with the directors of other department within the division. Prior to his arrival, two company vice presidents tell him that Ms. Parshley might

be a challenge. (CX 38, Ms. Parshley's testimony, and Mr. Harry's testimony)

Late August 2000 - Mr. Steve Ford, an employee working for Ms. Parshley, informs Mr. Harry that he is resigning because of Ms. Parshley's unacceptable behavior. (RX 1 and RX 30)

September 1, 2000 - Ms. Parshley conducts a CAD with one of her employees. (CX 28)

Fall of 2000 - Mr. Radke repeatedly, about once a month, tells Mr. Harry that Ms. Parshley's group is unresponsive and providing ineffective support for his organization. His employees experienced difficulty in obtaining information from Ms. Parshley and her employees. On another occasion, her group destroyed engine maintenance cost data. In her defense, Ms. Parshley expresses her opinions to Mr. Harry about the shortcomings in Mr. Radke's group. Eventually, Mr. Harry becomes a go-between. When Mr. Radke needs information, he asks Mr. Harry. Mr. Harry then asks Ms. Parshley for the data. (CX 38, RX 23, RX 30, and Mr. Harry's testimony)

Mr. Martin, the Senior Director for Engineering and Maintenance, complains to Mr. Harry that Ms. Parshley is interfering with this group's work. According to Mr. Martin, Ms. Parshley's failed to notify him when she has pulled his group's unbudgeted engineering work orders, which proved disruptive in completing the repairs. Mr. Martin indicated her attitude was unhelpful and uncooperative. Mr. Martin believed Ms. Parshley impeded, rather than improved, the company's operational image as it struggled for survival in 2000. After the arrival of Mr. Harry, Mr. Martin told his managers to go to Mr. Harry directly. (CX 38, RX 26, RX 30, Mr. Harry's testimony, and Mr. Martin's testimony)

Mr. Seymour informs Mr. Harry a couple of times that Ms. Parshley's financial group is difficult to work with and she is not supportive of his organization. Because he considers her unapproachable, Mr. Seymour bypasses her and attempts to deal directly with her staff. However, that practice generates anxiety in her staff. In response, Mr. Harry starts handling Mr. Seymour's financial requests. (CX 38, RX 24, and RX 30, and Mr. Seymour's testimony)

Ms. Allison Burton, an employee of Ms. Parshley, informs Mr. Harry that Ms. Parshley did not have good management or communication skills. (RX 25 and RX 3)

Mr. John Chapman, an employee of Ms. Parshley complains to Mr. Harry a couple of times that she is interfering with his ability to accomplish his warranty work. He expresses his belief that Ms. Parshley disrupted the warranty department's actions by restricting their communications with managers outside the department. (RX 27, RX 30, and Mr. Chapman)

Ms. Namita Vaidya complains to Mr. Harry about Ms. Parshley's reaction at a staff meeting when Ms. Vaidya forgot a task. (RX 28 and RX 30)

Several managers who are Ms. Parshley's customers, including Mr. Martin, Mr. Radke, and Mr. Seymour, are identified to participate in her 2000 360 degree feedback evaluation. Ms. Parshley

expresses her concern to Mr. Harry that two of the senior managers may not be objective due to the actions she has taken. Mr. Harry acknowledges the issue but also stresses the importance of getting along with all customers. (RX 34 and Ms. Parshley's testimony)

Ms. Parshley is selected for the company mentoring program. (CX 3)

November 2000 - Since the installation of a different computer system a year or two prior, many aircraft parts were issued and then returned to the warehouse without all the associated computer entries being made. Eventually, by November 2000, about 800 aircraft parts were on the warehouse shelves that didn't appear as completed in the computer inventory. To fix the problem, Mr. Stanton and a warehouse supervisor decide to record "pretend" issue transactions which reduces the bin count in the computer. Mr. Stanton informs Ms. Parshley of this adjustment. (CX 22, CX 23, RX 42, and Mr. Stanton's testimony)

Mr. Harry completes a leadership survey for Ms. Parshley identifying numerous leadership qualities possessed by Ms. Parshley and recommends positive relationships with business managers as an improvement area. (RX 9, and Mr. Harry's testimony)

December 2000 - Ms. Parshley receives the results of her 360 degree feedback survey for 2000. With an overall score of 3.7, her highest score of 4.3 highlights her drive for results and places her in the top half of the company's managers. However, although Ms. Parshley self appraised herself as a 4 or a 5 in each area, the feedback participants gave her a 3.4 for communication and respect for other rank, placing her in the bottom 25% of the company's managers for those skills. She receives specific development recommendations to better communicate with her customers and work with all the division's different personalities. Ms. Parshley discusses her concern with Mr. Harry about the objectivity of some of the customer managers' inputs. (CX 4, CX 38, RX 10, RX 57, and Mr. Harry's testimony).

December 17, 2000 - Ms. Karen Levy applies for a job with America West as a senior analyst. (CX 16).

January 2001 - In preparing a draft of Ms. Parshley's 2000 performance appraisal, Mr. Harry discusses with Ms. Parshley her communication problems with other company managers and stresses the need to work on interpersonal relationships. (CX 38, RX 11, RX 12, and Mr. Harry's testimony)

Spring 2001 - One of Ms. Parshley's employees expresses her bewilderment to Mr. Harry about her last performance appraisal. Ms. Parshley had given the employee a high rating which surprised the employee. Based on the employees' daily contacts with Ms. Parshley, she was afraid of being fired. (CX 38, and Mr. Harry's testimony)

An applicant for a position in Ms. Parshley's organization expresses his reservation to Mr. Harry about working for her. The applicant indicates Ms. Parshley has a reputation for being a

difficult supervisor. (CX 38)

Mr. Harry reviews Ms. Levy's resume for the opening of capital manager. (CX 38)

Mr. Seymour again expresses to Mr. Harry his general frustration with Ms. Parshley, finding her difficult. His group struggled to work with her organization. (Mr. Harry's testimony and Mr. Seymour's testimony)

The individual who had received the CAD from Ms. Parshley in September 2000 resigned and informed Mr. Harry that Ms. Parshley gave poor instructions and directions. (CX 38, and Mr. Harry's testimony)

Mr. Harry continues to receive complaints from Mr. Martin and Mr. Radke about Ms. Parshley's performance. He interjects himself as a point of contact so the senior managers would not avoid the financial group. (Mr. Harry's testimony)

Mid-March 2001 - [[In mid-March 2001, two critical discussions took place at America West which eventually formed the core of Ms. Parshley's alleged protected activity. Since the parties to each of these conversations have differing recollections about the exchange between each other, making a specific finding regarding the contents of each conversation requires some analysis and consideration of several related factors.

The first discussion, which set the stage for this case, occurred between Mr. Stanton, an inventory control specialist working for Ms. Parshley, and Ms. Parshley in mid-March 2001. According to Ms. Parshley's recollection, which she presented at the hearing, Mr. Stanton came to her in mid-March 2001 for two reasons. First, he told her about an inventory discrepancy because it which might have a financial impact. Second, Mr. Stanton was concerned that aircraft parts inspections had not been verified because Mr. Liberio made inspection and binning entries for about 800 aircraft parts on one occasion in March 2001 without confirming the inspections for the parts which had arrived in the warehouse in November 2000. In her pre-hearing deposition, Ms. Parshley added that Mr. Liberio made these entries also without verifying that they had serviceable tags. (CX 24, CX 37, RX 57, and Ms. Parshley's testimony)

Mr. Stanton's recollection of their mid-March 2001 exchange differs from Ms. Parshley's version in three respects. First, according to Mr. Stanton, he informed Ms. Parshley about the computer entries for the 800 parts in November 2000 (not March 2001) in explaining how he and the warehouse supervisor intended to use "pretend" stock transactions as part of a plan to balance the physical and computer inventories. Second, he had no safety concerns about the inspection or binning entries for these 800 parts because they were "pretend" transactions. Third, although Mr. Stanton also informed Ms. Parshley of his separate, and unrelated, safety concern about the absence of FAA required serviceable tags on some aircraft parts in the warehouse, he passed on that observation sometime between November 2000 and March 2001. (Mr. Stanton's testimony)

I found Mr. Stanton to be a very credible witness. As an employee of America West, Mr. Stanton was reluctant to testify because he believed he had some testimony that was not favorable to company. Despite his hesitation, Mr. Stanton was straight forward and candid. In light of Mr. Stanton's credibility and since Ms. Parshley did not have first hand knowledge relating to subjects of her alleged safety complaint, whereas Mr. Stanton did, the disconnects between Mr. Stanton's recollection and her testimony about their mid-March 2001 lessens my confidence in accepting Ms. Parshley's presentation of the discussion. I also note that Ms. Parshley's version completely misstates, possibly due to misunderstanding, Mr. Stanton's view of the significance of the computer entries for the 800 parts. Since Mr. Stanton was not troubled by those entries because they were fictitious transactions, he would hardly have expressed a safety concern to Ms. Parshley about the 800 parts. Rather, Mr. Stanton's sole safety concern involved the missing serviceable tags. Mr. Stanton's version of their conversation is further supported by a subsequent e-mail message in August 2001 from Mr. Stanton to Ms. Parshley (CX 22 and RX 42). In that correspondence, Mr. Stanton indicates he believes the transactions were accomplished in November 2000. He also highlights the problem developed through their use of an "issue" to adjust the inventory and because "people don't know how to use the system." Finally, even if their respective testimonies stood in equipoise, Ms. Parshley still fails to establish under the preponderance of the evidence standard that her recollection should prevail.]]

Consequently, I specifically find that Mr. Stanton informed Ms. Parshley in mid-March 2001 that as a result of the incomplete process of making computer adjustments, including the entries for 800 parts, in November 2000 to rectify an identified physical inventory/computer inventory imbalance, the computer inventory in March 2001 showed more parts available than the company had physically in the warehouse. This accounting imbalance required an inventory adjustment of about \$182,000. Further, by March 2001, Mr. Stanton had also passed on to Ms. Parshley his observations that some aircraft parts sitting in the warehouse did not have the FAA-required serviceable, or airworthiness, tag.

[[The second important discussion of mid-March 2001 occurred between Ms. Parshley and Mr. Harry. Mr. Harry, initially did not remember, but now dimly recalls, the encounter as a conversation about a processing problem during the receipt of aircraft parts. According to Mr. Harry, Ms. Parshley did not mention a safety concern. Instead, she told him about an error in the warehouse aircraft parts receiving process. She also expressed an intention to obtain some reports to document the improper receipt process. She did not make a safety complaint. Nor did she mention Ms. Grey. Mr. Harry viewed Ms. Parshley's report as a routine accounting issue. (CX 24, CX 37, CX 38, and Mr. Harry's testimony)

On the other hand, at the hearing, Ms. Parshley provided extensive details about their mid-March 2001 conversation. According to Ms. Parshley, right after her conversation with Mr. Stanton, she approached Mr. Harry and told him about Mr. Stanton's investigation of the processing of 800 parts. She also told him about the serviceable tag issue and the importance of complying with the processing procedures. Ms. Parshley indicated her belief that the situation could potentially be a very important safety concern. She expressed her intention to get documentation out of the computer

system and present it to Ms. Grey, the Director of Quality. In response, Mr. Harry nodded his agreement. He also concurred with obtaining documentation and advising Ms. Grey. (Ms. Parshley's testimony)

As I have determined above, Mr. Stanton did not tell Ms. Parshley either that the inspection entries were not accomplished until March 2001 or that process of making those entries raised a safety concern. At the same time, I conclude based on both the more specific recollection of Ms. Parshley in contrast to Mr. Harry's dim remembrance, and the subsequent actions of both Ms. Parshley and Mr. Harry that, while misunderstanding some of the specifics of Mr. Stanton's comments, Ms. Parshley told Mr. Harry in mid-March 2001 that recent irregular inspection entries concerning the receipt of 800 parts might be a problem which she intended to investigate by obtaining a computer report prior to taking the concern to the Quality department. She also passed on Mr. Stanton's observation about missing serviceable tags to him. However, based on the parties subsequent behavior and comments, I conclude that Ms. Parshley did not draw Mr. Harry's attention to a serious safety issue during this conversation.

In the days and weeks following their conversation, neither Mr. Harry nor Ms. Parshley behaved as if a significant safety problem existed in the America West's parts warehouse. Mr. Harry testified that he would have reported a safety issue immediately to the Quality department. The record contains insufficient evidence to conclude that Mr. Harry would purposefully suppress a report in mid-March 2001 from Ms. Parshley concerning a safety problem in the company's warehouse. Instead, his action of directing Ms. Parshley to finish a "close out" audit rather than permitting her to take on the parts' receiving study, is more consistent with a mid-March 2001 conversation that involved an inventory accounting irregularity and reflects his judgment that the "close out" audit had higher priority.

Following the mid-March 2001 conversation, Ms. Parshley also behaved as if the central issue in the parts warehouse involved the parts receiving process rather than a significant safety concern. While she did mention the serviceable tag discrepancy to Mr. Harry, Ms. Parshley's central focus was on the receipt process for the 800 parts. In her spring 2002 deposition (RX 57), Ms. Parshley stated that by conducting the inquiry she wanted to see if 800 parts transactions had been accomplished at one time in March 2001, several months after the parts were received in November 2000. In her view, it was inappropriate for parts to be placed on the shelves in November 2000 and then sit in a queue "and not inspected but being on the shelf and then all transacted in one evening in March."

I have considered Ms. Parshley's explanation that the audit was necessary to substantiate the safety problem. However, I believe her approach in fact demonstrates that Ms. Parshley's focus, and pressing concern, at that time, although misplaced, was on the inspection process for 800 parts rather than verifying missing serviceable tags for aircraft parts. The actual absence of serviceable tags on parts sitting in the warehouse that might be readily available for use on America West aircraft would seem to require an immediate response through confirmation by a physical inspection of the parts. As a person with a reputation within the company for being vocal about safety concerns who had previously demonstrated no lack of hesitation to express her views on aviation safety at America

West, Ms. Parshley's stated plan of action after Mr. Stanton's report strongly suggests her concern was focused on the receipt irregularity and not a safety problem that would be readily verifiable.

Further, while Ms. Parshley may now believe that she presented significant safety concerns to Mr. Harry in mid-March 2001, including the concern about missing serviceable tags, some of Ms. Parshley's prior comments reflect less certainty. When Ms. Parshley contacted her FAA acquaintance at the end of May 2001, she indicated that she may have discovered something while working at America West that was more serious than she had realized (CX 23). While that statement explains her delay in contacting the FAA, it also implies Ms. Parshley's initial reaction to Mr. Stanton's report did not include a serious safety concern. In January 2002, Ms. Parshley characterized her complaint as an "inventory control issue" (RX 52). A few months later, in an email correspondence to Mr. Stanton in the summer of 2001 (RX 46), Ms. Parshley asked him if he ever found parts without the proper tags. Specifically, she comments, "I believe you had told me you did, but I don't recollect how frequently or how many." (RX 46).

Both her initial focus in mid-March 2001 on accounting processing problems, and the recency of her conviction that the Parshley-Harry conversation did address safety issues, is also apparent when her hearing testimony about the legal aspect of the parts warehouse problem is compared with her earlier statement on the subject. In her testimony at the hearing, Ms. Parshley stated that in order for an aircraft part to meet FAA requirements and be "legal" for placement on an aircraft, it needs an accompanying serviceable tag. Yet, in the August 2001 e-mail to Mr. Stanton (RX 46), Ms. Parshley explains that she "was not necessarily trying to show that the company was doing something illegal. I was showing them that the company was not following the process required by the manual."

Finally, Mr. Harry's denial that Ms. Parshley raised any safety concern is believable. Although his dim memory does lessen the probative value of his recollection about the conversation, Mr. Harry not only behave as if no safety concern was presented, Ms. Parshley's version of the conversation ironically provides support for Ms. Harry's purported understanding of their discussion. According to Ms. Parshley, after passing on her significant safety concerns, Mr. Harry merely nodded agreement and "didn't really express much emotion at all" (RX 57). Such a response might suggest a lack of concern for safety.¹⁵ On the other hand, Mr. Harry's nodding agreement is just as consistent with the view that he was responding to a report of an parts receiving irregularity. Likewise, her stated plan of action to Mr. Harry to conduct a computer audit reflects an intention to verify an accounting issue and, as I noted above, convenes an emphasis on the proper accounting for the parts receiving discrepancies, rather than prompt identification, and elimination, of a significant safety problem associated with America West's aircraft parts.]]

¹⁵Mr. Harry also nodded on another occasion when Ms. Parshley expressed her surprise that no one was injured when an aircraft's nose wheel collapsed in a maintenance hanger. (RX 57) Since that exchange did not involve a purported safety complaint by Ms. Parshley to Mr. Harry, I do not consider it indicative of his safety consciousness.

Accordingly, I specifically find Ms. Parshley informs Mr. Harry in mid-March 2001 that discrepancies in the receiving process for 800 aircraft parts has been identified and that there might be a serviceable tag problem. Prior to taking the matter to Ms. Grey, the Quality Director, Ms. Parshley expresses her intention to run a computer inquiry to document the problems. Mr. Harry nods his agreement.

March 15, 2001 - Mr. Harry formally rates Ms. Parshley's performance for 2000. In preparing the appraisal, Mr. Harry reviews her 360 degree surveys and observes that trend-wise, Ms. Parshley has dropped into the lower 25th percentile in the area of customer satisfaction. On the performance appraisal, Mr. Harry gives Ms. Parshley an overall rating of "meet expectations" which indicates she contributed to the success of the company. Carrying more responsibility than her peers, Ms. Parshley was a capable manager with good technical skills who developed a loyal staff. As a strength, Ms. Parshley relied on experience to become the division's best resource for collecting and analyzing financial data. Mr. Harry recognizes her technical skills. However, as indicated in a recent feedback survey, Ms. Parshley struggled with her professional relationships with some division managers. To improve her performance and advancement potential, Mr. Harry recommends that she better manage her division manager relationships. In their discussion about the appraisal, Mr. Harry refers to their January 2001 discussion about customer relationships. He acknowledges her efforts in that area and stresses that to advance in the company, Ms. Parshley would have to improve her inter-departmental relationships and work with people at all levels. Finally, Mr. Harry expresses his appreciation for her assistance and his respect. Mr. Harry recommends a salary increase, slightly lower than the company's average. (CX 1, CX 24, CX 38, RX 13, RX 57, Ms. Parshley's testimony, and Mr. Harry's testimony)

April 11, 2001 - America West opens the position of Manager, Capital Projects, for the Maintenance and Engineering Department. The closing date is April 20, 2001. (CX 12)

April 18 to April 30, 2001 - The company announces on April 18, 2001 a cost reduction program, which includes a 10% reduction in management overhead. Ms. Parshley becomes aware of the Chairman's announcement that America West would engage in a cost cutting action reduction program reducing the administrative work force by 10% through attrition, deferred hiring and selective reduction in force. Mr. Harry is informed about the 10% cost and 5% personnel reduction. He discusses with Ms. Parshley the general effect the restructuring might have on the finance group but does not inform her that he is considering ending her employment. They decide to utilized deferred hiring to meet their goal so that no one in her department is affected. (CX 18, RX 14 and Ms. Parshley's testimony)

In light of the company restructuring and upon review, Mr. Harry concludes his group is not performing well due to a break down in communications caused in part by Ms. Parshley's approach to some division managers. As a result, Mr. Harry decides to submit Ms. Parshley as part of the staffing reduction. Although Ms. Parshley's performance did not deteriorate after the March 2001 appraisal, the operating environment became critical with the cost reduction program. The company's restructuring program challenges him to improve the effectiveness of his financial group.

While acknowledging Ms. Parshley's concerns about the managers' input on the 2000 360 degree performance survey, Mr. Harry believes the results, which placed her in the lower 50% of the company's manager, are very relevant in terms of performance. He is also concerned about the financial group's effectiveness. Mr. Harry believes that Ms. Parshley's relationships with other managers are still not functioning. Based on advice not to discuss any termination prior to the formal notice, Mr. Harry does not inform Ms. Parshley that he is considering ending her employment. (CX 38, and Mr. Harry's testimony)

Mr. Harry recommends to his supervisor, Mr. John Wilson, that Ms. Parshley's employment be terminated. Mr. Wilson discusses the recommendation with Mr. Seymour who concurs with the termination of her employment based on his observations of her performance. Mr. Wilson approves the termination recommendation. (CX 38 and Mr. Seymour's testimony)

May 2, 2001 - In a meeting with Mr. Harry and Ms. Prelog, Ms. Parshley receives a notice of separation and a severance package. The separation notice states Ms. Parshley is being laid off due to lack of work/reduction in force. The information attached the America West's severance package for Ms. Parshley advises that in response to a weakening economy, cost cutting measures were necessary to maximize staffing efficiency. Thus, based on either financial or business efficiency considerations, some employees were being released from their positions. The notice indicates that some of the vacate positions may be filled. The severance package offered about \$10,000 and career counseling in exchange for a release of the company and voluntary resignation. (CX 7, CX 8, CX 19, CX 24, RX 15, and Ms. Parshley's testimony)

[[Some conflict exists between Ms. Parshley, Mr. Harry, and Ms. Prelog, concerning their recollection of the statements made during their employment termination meeting. During the separation discussion, Ms. Parshley believes she was informed that her position was being eliminated. Mr. Harry doesn't recall whether he made that statement. However, the third person at that meeting, Ms. Prelog testified that Ms. Parshley was not told that her position was eliminated. Based the testimonial standoff of these participants, the cover letter statement indicating some positions may be filled, and in light of Ms. Parshley's burden of proof, I ultimately conclude Ms. Parshley is unable to establish that she was told her position was being eliminated.]]

When informed of her employment termination, Ms. Parshley asks for the reason and Mr. Harry tells her that due to "issues" she was being let go. Mr. Harry expresses his intention to have her staff report to him. Ms. Parshley does not sign the severance agreement. (CX 38, Ms. Parshley's testimony, Mr. Harry's testimony, and Ms. Prelog's testimony)

May 2001 (after Ms. Parshley's departure) Mr. Harry informs Ms. Parshley's staff that her departure was part of the headcount reduction and restructuring. Her termination was made for business reasons and not a reflection about her. (CX 14, CX 38, RX 36, RX 37, and Mr. Harry's testimony)

May 8, 2001 - Mr. Harry circulates a staffing request for Ms. Levy. The Division Controller

signs the staffing requisition for a Finance Manager in the Maintenance and Engineering Department. A minimum requirement includes the ability to both negotiate and communicate effectively with all management levels. (CX 13, CX 38)

By May 8th, 2001, in the Operations Planning organization, the position of Senior Director of Operations Planning, along with its incumbent, had been eliminated and Ms. Parshley had been removed from the Manager, Contracts and Warranties, position. (CX 17)

May 11, May 15, and June 7, 2001 - Mr. Harry offers Ms. Levy the position of Finance Manager. Four days later, Ms. Levy accepts the position and arrives to work at the beginning of June 2001. (CX 15, CX 16)

May 14, 2001 - Ms. Parshley files a sexual harassment discrimination complaint with the EEOC. (RX 16)

May 25, 2001 - Ms. Parshley contacts an acquaintance in the FAA management to express her belief that she was terminated because she had potentially damaging information on the company's improper processing of aircraft parts received into the warehouse. Although not an inventory parts expert, Ms. Parshley believed, based on her pilot experience that the processing oversight might be serious and she requested assistance in notifying the proper authorities. She asks for FAA assistance if the material handling oversight is serious (CX 23)

July 12, 2001 - EEOC informs Ms. Parshley that it is unable to establish a violation and provides Ms. Parshley notice of her right to sue. (RX 19)

July 31, 2001 - Ms. Parshley explains to an FAA representative that at the end of March 2001, Mr. Stanton told her some aircraft parts had not been properly processed into the company's warehouse. Ms. Parshley believes it is possible due to these improper computer entries for these parts to be made available for use (CX 24)

August 7, 2001 - Mr. Stanton attempts to find the computer files relating to the 800 part numbers and discovers the files have been deleted. (CX 22, RX 42)

August 31, 2001 - An FAA official informs Ms. Parshley that their review of America West's material handling process found them in compliance. (CX 37)

In the year following May 2, 2001 Ms. Parshley becomes a flight instructor and earns \$400. She also increases her work as an on-line teacher in finance, accounting and economics, earning another couple thousand dollars. Ms. Parshley pursues job leads from newspaper ads, the internet, and personal contacts but is unsuccessful in finding a full-time job. (RX 57, Ms. Parshley's testimony, and Mr. Cokely's testimony)

Other findings - When an aircraft mechanic receives an aircraft part, he or she makes the final

determination whether the part is serviceable. (Mr. Stanton's testimony)

During America West's May 2001 cost reduction program, 120 individuals, including a vice-president, senior director, five directors, and twenty managers, are separated based on job performance, skills, company need, productivity, operations, and tenure. (Ms. Prelog's testimony)

Case in Chief, Affirmative Defense, and Burdens of Proof

Under the analytical framework set out in 42 U.S.C. § 42121(b) (2) (B) and 29 C.F.R. §§ 1979.104 and 1979.109, the adjudication of an AIR 21 discrimination complaint involves consideration of the complainant's case in chief, the respondent's potential affirmative defense, and the respective burdens of proof.

Case in Chief

Regarding a complainant's case in chief, to establish a discrimination complaint and entitlement to relief, the complainant must prove by a preponderance of the evidence that a protected activity was a contributing factor¹⁶ in an unfavorable personnel action. In the absence of direct evidence of discrimination, such as an admission by a respondent that discrimination was factor, a complainant may establish the inference of discrimination by presenting a *prima facie* case of discrimination¹⁷ involving following four elements: (1) the complainant engaged in a protected activity; (2) the respondent knew the complainant engaged in the protected activity; (3) the complainant suffered an unfavorable personnel action; and, (4) the circumstances are sufficient to raise the inference that the protected activity was likely a contributing factor in the unfavorable action. 29 C.F.R. §§ 1979.104 (b) (1) (i) to (iv); *see also* *Zinn v. University of Missouri*, 93 ERA 34 and 36 (Sec'y Jan 18, 1996).

If the complainant presents evidence of a *prima facie* case, the respondent then has an

¹⁶The court in a case involving a protected activity discrimination complaint under the ERA, which contains similar employee protection provisions as AIR 21, *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993), defined "contributing factor" as "any factor which, alone or in connection with other factors, tends to affect in any way" the decision concerning an adverse personnel action.

¹⁷I recognize the Administrative Review Board's position that in a fully litigated case in which the respondent presents evidence of a legitimate motive for the personnel action the analysis of a *prima facie* case serves no analytical purpose because the final decision will rest on the complainant's ultimate burden of proof. See *Adjiri v. Emory University*, 97-ERA-36 (ARB July 14, 1998) and *Carter v. Electrical District No. 2 of Pinal*, 92-TSC-11 (Sec'y Jul. 26, 1995). However, despite some duplication of effort, I find that working through the *prima facie* elements useful because if the complainant, even in a fully litigated hearing, fails to establish an element of the *prima facie* case, the complainant's case fails.

opportunity to produce evidence either challenging the existence of the *prima facie* elements, thereby negating the inference of discrimination, or demonstrating that discrimination was not involved. Upon the presentation of the respondent's evidence, the complainant's establishment of a *prima facie* case becomes irrelevant. Instead, the trier of fact must determine the ultimate issue in the case in chief, whether the complainant has proven by a preponderance of the evidence that the respondent retaliated against her for engaging in a protected activity. *See Carroll v. USDOL*, 78 F. 3d 352, 356 (8th Cir. 1996) (case below *Carroll v. Bechtel Power Corp.*, 91-ERA 46 (Sec'y February 15, 1995)). Consequently, during the entire case in chief process, the complainant retains the burden of proof.

Affirmative Defense

In the event that a complainant proves the case in chief by a preponderance of the evidence, a respondent may still avoid liability for the discrimination through a statutory and regulatory affirmative defense. According to 49 U.S.C. §§ 42121 (b) (2) (B) (ii) and (iv) and 29 C.F.R. § 1979.109 (a), a complainant may not obtain relief under the Act if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity. In asserting this affirmative defense, the burden of proof at the clear and convincing level rests with the respondent. Although there is no precise definition of "clear and convincing," that evidentiary standard falls above preponderance of the evidence and below a reasonable doubt. *See Yule v. Burns International Security Service*, 93-ERA-12 (Sec'y May 24, 1995).

Issue No. 1 - Protected Activity

As mentioned above, the first requisite element for a *prima facie* case is a protected activity. The Secretary has broadly defined a protected activity as a report of an act which the complainant reasonably believes is a violation of the subject statute. While it doesn't matter whether the allegation is ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations" *Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8. The alleged act must implicate safety definitively and specifically. *American Nuclear Resources v. U.S. Dept. of Labor*, 143 F.3d 1292 (6th Cir. 1998), citing *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995). In other words, the complainant's concern must at least "touch on" the subject matter of the related statute. *Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and, *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994). Additionally, the standard involves an objective assessment. The subjective belief of the complainant is not sufficient. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997).

The implied purpose of the employee protection provisions of AIR 21, to encourage the reporting of matters involving or relating to violations of any FAA order, regulation, or standard concerning air carrier safety also affects the scope of protected activity. 49 U.S.C. § 42121 (a) (1). The Supreme Court noted in a parallel statute, that the statute's language must be read broadly because "[a] narrow hyper technical reading" of the employee protection provision of the Act would

do little to effect the statute's aim of protecting employees who raised safety concerns. *Kansas Gas & Electric Company*, 780 F.2d 1505 (10th Cir. 1985), cert. denied 478 U.S. 1011 (1986). Such statutes have a "broad, remedial purpose for protecting workers from retaliation based on their concerns for safety and quality." *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984). As a result, the courts and the Secretary have broadly construed the range of employee conduct which is protected by the employee protection provisions contained in environmental and nuclear acts. See S. Kohn, *The Whistle Blower Litigation Handbook*, pp. 35-47 (1990).

Although the above principles were developed in environmental whistle blower cases, the underlying purposes for the whistle blower protections and principles are readily adaptable to Ms. Parshley's case. Consequently, a protected activity under AIR 21 has two elements. First, the complaint must involve a purported violation of an FAA regulation, standard or order relating to air carrier safety, or any other provision of Federal law relating to air carrier safety. Second, the complainant's belief about the purported violation must be objectively reasonable.

The alleged safety complaint in this case involves Ms. Parshley's communication to Mr. Harry about aircraft parts in mid-March 2001. Although the parties to that conversation have different versions, I have already determined in my specific findings that Ms. Parshley reported two problems: improper inspection entries in the computer system that tracks aircraft parts and the absence of serviceable tags with aircraft parts.

A. Inspection Computer Entries

Ms. Parshley indicated to Mr. Harry that she had received a report that an individual had made improper computer entries indicating the completion of the inspection step for 800 incoming aircraft parts without verifying completion of the inspection documenting serviceability.¹⁸ However, Ms. Parshley has failed to identify any FAA regulation or aviation statute that requires the recording into a computer inventory system of the completion of an inspection for an aircraft part. In other words, the inaccurate computer recording keeping of aircraft parts inspections does not standing alone involve a breach of a regulatory or statutory aviation safety requirement.

I have considered the mandate to broadly interpret the meaning of protected activity. Yet, for Ms. Parshley's report on the seemingly improper computer entries for 800 aircraft parts to come under the protected activity umbrella, an inference must be made that the failure of the employee to verify completion of the inspection prior to making the computer entry documenting the inspection completion caused the company to fail to ensure that its aircraft parts had the requisite FAA

¹⁸An interesting collateral issue associated with this case involves Ms. Parshley's misinterpretation of Mr. Stanton's observation. What Ms. Parshley failed to understand about Mr. Stanton's report is that the entries were meant to be fictitious and used as a means to rectify an imbalance between the physical and computer parts inventories. Knowing the fictitious nature of the computer entries, Mr. Stanton, the person with first hand knowledge of the event, had no safety concerns about the practice.

mandated inspections and certifications. While Mr. Stanton did report the absence of serviceable tags in a few instances (which I will discuss next), the record evidence is insufficient to establish that the inaccurate data entries relating to 800 aircraft parts caused the serviceable tag issue.

I find Ms. Parshley has failed to meet her burden of establishing that her report to Mr. Harry about improper inspection completion entries in the America West's computer inventory system objectively involved a violation of an FAA regulation, standard or order, or any other Federal law relating to air carrier safety. Consequently, Ms. Parshley's report of the inaccurate parts inspection computer entries was not a protected activity.

B. Serviceable Tags

As set out in my specific findings, Ms. Parshley also mentioned to Mr. Harry in mid-March 2001 that some aircraft parts in the company's warehouse bins did not have the FAA-required serviceable tag. Based on Mr. Stanton's uncontradicted testimony, I find that the FAA does require aircraft parts available for service and installation on aircraft to be accompanied by a serviceable tag which certifies that a proper serviceability inspection has been accomplished by a qualified individual. Since this portion of Ms. Parshley's complaint did touch on the company's potential failure to adhere to the FAA serviceability tag requirement, I find this portion of Ms. Parshley's mid-March 2001 conversation with Mr. Harry was a protected activity.

Issue No. 2 - Ms. Parshley's Case in Chief

Since a portion of Ms. Parshley's mid-March 2001 involved a protected activity, I now must consider whether she had proven by a preponderance of the evidence that her protected activity of reporting missing serviceability tags contributed to her termination of employment on May 2, 2002.

A. *Prima Facie* Case

As previously discussed, Ms. Parshley may establish a *prima facie* case of discrimination by showing: (1) she engaged in a protected activity; (2) America West was aware of the activity; (3) she suffered an adverse personnel action; and, (4) the circumstances raise the inference that her protected activity contributed to the unfavorable personnel action.

Concerning the first element, I have already determined that Ms. Parshley's report of missing serviceable tags for aircraft parts was a protected activity. For the second element, as I have previously determined, Ms. Parshley conveyed that report to Mr. Harry. Thus, her mid-March 2001 discussion with Mr. Harry establishes the second element. Ms. Parshley's May 2, 2001 employment termination satisfies the third element.

Turning to the fourth element, Mr. Harry testified that in the later part of April 2001 he decided to recommend Ms. Parshley be separated from the company. That recommendation was

approved and placed into effect on May 2, 2001. Based on the temporal proximity between Ms. Parshley's mid-March 2001 protected report and Mr. Harry's recommendation for termination and her actual separation, Ms. Parshley is also able to raise a reasonable inference that her protected activity contributed to her separation from America West.¹⁹

B. America West's Rebuttal and Ms. Parshley's Ultimate Burden of Proof

Although Ms. Parshley has established a *prima facie* case of discrimination, America West has presented evidence of a legitimate reason for the company terminating her employment. As a result, I must now determine whether Ms. Parshley can prove by a preponderance of the evidence that her employment discharge was based in part on her protected activity.

To rebut Ms. Parshley's *prima facie* case, America West asserts that Mr. Harry selected Ms. Parshley for separation during a company-wide cost reduction program based on performance issues. Ms. Parshley understandably challenges that presentation. Since her employment in 1997, Ms. Parshley steadily received promotions, increased responsibility, and salary advances. She was also selected for the mentoring program. Her supervisors consistently rated her overall job performance as meeting expectations and never expressed that she should be concerned about her job. In March 2001, Mr. Harry also found she met expectations and praised her job expertise and management of her group. Although Mr. Harry did comment on her need to improve departmental relationships, he did so in the context of Ms. Parshley being able to advance in the company. Mr. Harry never invoked the company's policies on dealing with performance problems. During the cost reduction program in April 2001, Ms. Parshley and Mr. Harry agreed the best approach for their group was to leave positions open rather than separate anyone. Mr. Harry never discussed his consideration of her termination. When Mr. Harry separated her on May 2, 2001, he did not elaborate on the criteria he used to select her. Finally, Mr. Harry's decision to hire an outside replacement for her position is inconsistent with the stated purpose of the cost reduction program to lower administrative overhead by 10% and personnel by 5%.

Mr. Harry denies his mid-March 2001 conversation with Ms. Parshley played any role in her selection for termination. He explains that Ms. Parshley had a long standing problem dealing with senior managers and directors, which he identified to her in January and March 2001. After her most recent appraisal, Mr. Harry continued to receive complaints and in the altered business environment caused by the April 2001 cost reduction program, Mr. Harry decided that releasing Ms. Parshley would improve the business effectiveness of his organization.

Upon consideration of the entire record and the presentations of the parties, I conclude for the reasons expressed below that most of the representations set out by both Ms. Parshley and Mr. Harry are true, which ultimately means Ms. Parshley is not able to meet her burden of proof.

Ms. Parshley's appraisals in the record since 1998 consistently recognized her accounting

¹⁹See *Conway v. Valvoline Instant Oil Change, Inc.*, 91-SWD-4 (Sec'y Jan 5, 1993).

expertise and contributions to the company. At the same time, all three of her supervisors, Mr. Jarvie, Mr. Hyland, and Mr. Harry, noted Ms. Parshley's problem relating to persons outside her group. Commenting on her performance for 1998, Mr. Jarvie in March 1999 suggested improvement in the area of interdepartmental relationships. A year later, in March 2000, Mr. Hyland, commenting on her 1999 performance, again stressed communication as an improvement area and highlighted the need to develop a customer service orientation. Finally, in a leadership survey, Mr. Harry first mentioned improvement in communication skills in November of 2000. Then, in January 2001, as he was preparing her appraisal, Mr. Harry felt compelled to again address the issue of better business relationships. When he presented the formal appraisal in March 2001, Mr. Harry still identified her difficulty with professional relationships.

Ms. Parshley's supervisors' assessment about her interdepartmental communication skills was corroborated by direct feedback from her business customers in 360 degree feedback surveys. About eight months after Mr. Jarvie highlighted interdepartmental relationships, Ms. Parshley received the lowest score on her November 1999 360 degree survey in the area of customer focus. This low score for customer focus, which occurred before many of the events which led her personality conflicts with some senior directors, provided a clear area for improvement since it placed her in the bottom 25th percentile of the company's managers. However, a little over a year later, Ms. Parshley's business customers still were generally not satisfied with her communications skills. Again, her low scores for communication and respect for others fell in the bottom 25th percentile of the company's managers.

Apparently Ms. Parshley's difficulties in 1998 and 1999 were known beyond her supervisors since two vice-presidents advised Mr. Harry prior to becoming her superior that Ms. Parshley would be a challenge. Shortly after his arrival, Mr. Harry began receiving negative feedback on Ms. Parshley's performance from some of her business customers, including Mr. Radke, Mr. Martin, and Mr. Seymour. He also received negative feedback on Ms. Parshley's communication skills from a few of her employees. Even after his November 2000 comments on her leadership survey, the December 2000 360 degree feedback survey, his January 2001 discussion on communication and the March 2001 appraisal comments, Mr. Harry continued to receive complaints from her customers to the extent that he felt compelled to step in and provide direct assistance for some senior directors.

Since at least January 1998, America West had in place a written policy mandating a progressive and "equitable" approach to poor performance. The graduated response to poor performance permitted an employee to demonstrate improvement before more severe personnel actions were taken. Had Ms. Parshley been laid off prior to April 2001, Mr. Harry's apparent failure to step through the policy's graduated responses, such as a CAD, to address Ms. Parshley's continuing interdepartmental business relationship problems would certainly impeach Mr. Harry's claim that he chose Ms. Parshley for separation based on poor performance. However, when Mr. Harry decided Ms. Parshley should be released, he did so in a fundamentally altered business environment. Upon the Chairman's April 18, 2001 cost reduction program announcement, America West was no longer in ordinary times.

According to at least one senior director, America West struggled for survival in 2000 and by April of 2001, the Chairman apparently felt compelled to further reduce the company's expenses by cutting administrative overhead and reducing the number of administrative personnel. Highlighting the challenges facing the airline industry, including high fuel prices and a soft economy, the Chairman stresses the need to take "decisive" measures to reduce costs (RX 14). A portion of the actions involve a 10% decrease in management and clerical payroll accomplished by attrition, deferred hiring, and select reductions in force. In his closing, the Chairman emphasized the importance of customer service and states that "no issue or process, no matter how minor, should be overlooked."

This fundamental change in the business environment caused by the cost reduction program adversely affected Ms. Parshley in two ways. First, the company's policy of graduated responses for poor performance seemed to be inapplicable since over 120 people, including at least one vice president, a senior director, five directors, and twenty managers, including Ms. Parshley, were selected for separation based on numerous criteria, including business effectiveness and performance at the start of May 2001, apparently without first receiving formal counseling or a CAD.

Second, and clearly more significant, the emphasis on business effectiveness during the cost reduction program perceived by Mr. Harry, highlighted Ms. Parshley's documented three year struggle with interdepartmental relationships. Prior to the cost reduction program, her communications difficulties were only an impediment for further advancement in the company. However, as of April 18, 2001, her deficit in interdepartmental relationships became a greater liability. With the initiation of the cost reduction program in April 2001, I believe Mr. Harry felt challenged to improve the business effectiveness and customer service of his financial group. Since his organization's purpose was to provide financial support to the other senior directors in the department, Ms. Parshley's deficit in that area came to the forefront. Although Ms. Parshley's substantive skills in her finance and accounting were well regarded, Mr. Harry had continued to receive complaints through the spring of 2001 from senior directors about her process. Ms. Parshley's difficulties in the area of dealing with senior directors had the effect of isolating her finance group from some of her customers and forced Mr. Harry to act as a intermediary.

Further, Mr. Harry did not possess the authority to separate Ms. Parshley. Instead, he had to submit his recommendation to his supervisor, Mr. John Wilson, for approval. One of Mr. Wilson's actions while considering Mr. Harry's recommendation corroborates Mr. Harry's statement that he reached his decision based on the performance issue involving communications. Notably, during his deliberations, Mr. Wilson asked at least one of Ms. Parshley's senior director customers, Mr. Seymour, about her performance. In response, Mr. Seymour supported Mr. Harry's recommendation. Although Ms. Parshley attributes Ms. Seymour's unfavorable opinion to other factors unrelated to her performance, the central point is that in reacting to Mr. Harry's recommendation, which he claimed was based on poor performance in handling her customers, Mr. Wilson did indeed query one of her senior director customers for an assessment.

Due to the sensitive nature of the selection for release, Mr. Harry's compliance with the company's advice not to discuss the termination with employees prior to formal notification does not

cast a sinister pall on his action. On the other hand, the fact that after Ms. Parshley was terminated, Mr. Harry hired Ms. Levy within a few weeks to accomplish many of Ms. Parshley's former responsibilities, does seem to run counter to the stated purpose of the cost reduction program. Effectively, through his hiring action of Ms. Levy, Mr. Harry did not accomplish any reduction in the payroll costs of his group. Ms. Levy's employment coupled with the inarticulate, or even absent, explanation provided to Ms. Parshley for her termination certainly explains Ms. Parshley's view of her termination action.

However, finding Mr. Harry a credible witness, I accept his explanation that his supervisor, Mr. Wilson, was able to obtain payroll savings in other areas of the organization to offset Ms. Levy's hire. Additionally, although the Chairman had announced some separation would be reductions in force and Ms. Parshley's separation notice lists reduction in force as the basis for her termination, the cover letter to the May 2001 severance package presented to Ms. Parshley states separation decisions were made "based on financial and/or business considerations. Some of the vacated positions will be eliminated and others may be filled in the future."

Finally, and significantly, I find Mr. Harry's denial that the mid-March 2001 conversation with Ms. Parshley played any role in his decision to recommend her for separation credible. Returning to my previous specific finding, I have concluded that Ms. Parshley did mention to Mr. Harry that a problem with the serviceable tags might exist. While I have found that statement to be a protected activity, I also emphasize that I further determined Ms. Parshley did not highlight the issue to Mr. Harry as a safety problem. Consequently, from Mr. Harry's perspective, the mid-March 2001 conversation was an ordinary business exchange, not involving safety issues, which played no role in his decision to separate Ms. Parshley due to her continued interdepartmental relationship issues.²⁰

In summary, for the reasons discussed above, and upon consideration of the record as a whole, I find the preponderance of the evidence demonstrates that the mid-March 2001 conversation between Mr. Harry and Ms. Parshley, which in part included her protected comments about a problem with serviceable tags for the company's aircraft parts, did not contribute in any manner to Mr. Harry's decision to recommend the termination of Ms. Parshley's employment during the May 2001 cost reduction program. Accordingly, the preponderance of the evidence does not support Ms. Parshley's complainant of discrimination due to her protected activity. Having failed to carry her burden of proof for her case in chief, Ms. Parshley's discrimination complaint under AIR 21 must be dismissed.

²⁰As an additional comment, Ms. Parshley suggests Mr. Harry recommended her termination because he was concerned about her reporting a safety problem to Ms. Grey or her FAA acquaintance. While Mr. Harry may not have liked Ms. Grey, Ms. Parshley did not indicate how such a report to her would adversely affect him. Likewise, terminating Ms. Parshley's employment would seem to encourage, rather than prevent, her contacting the FAA.

Issue No. 4 - Respondent's Attorney Fee²¹

Since Ms. Parshley has failed to establish by the preponderance of the evidence a violation of the employee protection provisions of the Act, I must address America West's claim for partial recoupment of its attorney fees up to \$1,000 under the statutory and regulatory provisions of AIR 21. If Ms. Parshley's complaint was frivolous or she brought the action in bad faith, then America West may be entitled to such relief.

Since Ms. Parshley was able to establish a *prima facie* case of discrimination and considering the apparent inconsistencies between her formal performance appraisals, advancement in the company, and subsequent selection for termination on the basis of performance, I find Ms. Parshley's belief that something else, such as her report about the aircraft parts, was behind her termination both understandable and sincere. Although I have determined the facts developed through litigation failed to confirm her suspicion (at least in regard to her aircraft parts report), I also find her complaint was neither frivolous nor brought in bad faith. Accordingly, the request for attorney fees by America West under 49 U.S.C. § 42121(b)(3)(C) and 29 C.F.R. § 1979.109 (b), must be denied.

ORDER

1. The discrimination complaint of MS. SHERRY J. PARSHLEY brought under the employee protection provisions of AIR 21 is **DISMISSED**.
2. The request by AMERICA WEST AIRLINES for attorney fees is **DENIED**.

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: August 2, 2002
Washington, D.C.

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of

²¹Since Ms. Parshley has not prevailed in her case in chief, I need not decide whether the evidence presented by America West rose to the evidentiary standard of clear and convincing proof to sustain an affirmative defense.

Labor (“Secretary”) pursuant to 29 C.F.R. §§ 1979.110 (2002), unless a petition for review is timely filed with the Administrative Review Board (“Board”), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file a written petition for review with the Board, which has been delegated the authority to act for the Secretary and issue final decisions under 29 C.F.R. Part 1979. To be effective, a petition must be received by the Board within 15 days of the decision of the administrative law judge. The petition must be served on all parties and on the Chief Administrative Law Judge. If a timely petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109 (c) and 1979.110 (a) and (b).